Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95- 188

In re Application of	)	
	)	
FOX TELEVISION STATIONS, INC.	)	File No. BRCT-940201KZ
	)	
	)	
For Renewal of License of Station WNYW-TV, New York, New York	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1995 Released: May 4, 1995

By the Commission: Commissioner Quello concurring and issuing a statement

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1. Fox Television Stations, Inc. ("FTS") seeks renewal of its license for station WNYW-TV (Channel 5) in New York City. The Metropolitan Council of NAACP Branches ("Metro NAACP") has petitioned to deny the renewal.[1] Also before us are numerous supplemental pleadings concerning the renewal application.[2]

I. INTRODUCTION

2. On May 23, 1994, FTS informed the Mass Media Bureau that The News Corporation Ltd. ("News Corp."), an Australian company, owns more than 99 percent of the corporate equity capital of FTS's parent company, Twentieth Holdings Corporation ("THC"), even though News Corp. owns only 24 percent of THC's voting stock. To determine whether the renewal application may be granted, we must therefore assess that ownership structure in light of Section 310(b)(4) of the Communications Act, which provides in pertinent part that:

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[1] The Petition to Deny and Reply to the Opposition to the Petition to Deny were filed in Metro NAACP's name only. Subsequent pleadings were filed on behalf of Metro NAACP and Hilda Rogers, Amnews, Inc., Wilbert A. Tatum, the New Jersey State Conference of Branches of the NAACP, Keith Jones, the Pennsylvania State Conference of Branches of the NAACP, Thomas Smith and Lynn Johnson, even though these individuals and organizations were not parties to the original Petition to Deny and have never formally sought to intervene. However, the Petition to Deny the WNYW renewal incorporates by reference an earlier Petition to Deny to which those individuals and organizations were parties. See Petition to Deny at 1.

[2] Before us are the following pleadings: (1) Petition to Deny FTS's renewal application, filed April 12, 1994 by Metro NAACP, and a Supplement thereto filed July 7, 1994; an Opposition to the Petition to Deny, filed May 12, 1994, by FTS, and a Reply, filed June 1, 1994, by Metro NAACP; (2) Metro NAACP's Further Supplement to Petition to Deny: Fox' [*sic*] Misconduct in Connection with the Gingrich Book Deal, filed January 27, 1995; FTS's Motion to Strike, filed February 6, 1995; Metro NAACP's Opposition to the Motion to Strike, filed February 22, 1995; and FTS's Reply to the Opposition to the Motion to Strike, filed March 1, 1995; (3) Comments of Metro NAACP and Comments of FTS, both filed February 27, 1995; Reply Comments of Metro NAACP and Reply Comments of FTS, both filed March 9, 1995; and (4) Rainbow Broadcasting, Inc.'s, Further Objection and Petition for Relief, filed March 9, 1995. Metro NAACP has also submitted a letter, dated March 22, 1995, purporting to "respond to several misstatements of fact" and "new matters" in FTS's Reply Comments. We have accepted and will consider the letter in the interest of fully airing the issues raised in this complicated proceeding.

> No broadcast . . . license shall be granted to or held by . . . any corporation directly or indirectly controlled by any other corporation of which . . . more than one-fourth of the capital stock is owned of record or voted by . . . any corporation organized under the laws of a foreign country . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

47 U.S.C. §310(b)(4). We must also decide whether the application should be designated for hearing based on other issues raised by Metro NAACP.

3. More specifically, this case presents the following issues: (1) whether News Corp.'s ownership of 99 percent of the capital contributed to THC exceeds Section 310(b)(4)'s benchmark of 25 percent of the "capital stock" of the company; (2) whether, if News Corp.'s interest is deemed to exceed the benchmark, FTS has intentionally concealed that fact or misrepresented its compliance with the statute in applications and other filings submitted to the Commission beginning in 1985; (3) whether News Corp. exercises *de facto* control over FTS or whether K. Rupert Murdoch, the Chairman of News Corp., controls FTS as the representative of News Corp.; and (4) if we find that FTS's alien ownership exceeds the benchmark, that FTS is under alien control, or that FTS has lacked candor, what remedial action, if any, is appropriate.

4. FTS takes the position that its corporate structure complies with Section 310(b)(4) because the 25 percent "capital stock" benchmark refers only to a parent corporation's shares of stock -- of which News Corp. owns 24 percent -- and not to an alien's equity stake. FTS also submits that at all times since 1985 it has fully disclosed to the Commission that News Corp. would have the entire "beneficial equity interest" in FTS and thus cannot be found to have lacked candor or misrepresented its compliance with the statute. FTS further contends that Murdoch, a United States citizen, holds both *de facto* and *de jure* control of FTS and that he holds *de facto* control of News Corp. as well. Finally, FTS asserts that, even if we were to find that its alien ownership exceeds the benchmark, that ownership is consistent with the public interest.

II. SUMMARY

5. This case presents complex factual and legal issues. In order to develop a clearer and more complete record upon which to evaluate the central factual issues raised in the Petition to Deny, the staff conducted an informal investigation into FTS's alleged lack of candor. As a result, the underlying facts and the positions of the parties have been clarified. The Commission now has a sufficient basis upon which to determine the proper course of action. For the reasons set forth below, we deny Metro NAACP's Petition to Deny, and grant FTS's renewal application conditioned upon FTS's election

either (1) to submit information demonstrating that the level of FTS's foreign ownership is consistent with the public interest; or (2) to come into compliance with the foreign ownership benchmark of Section 310(b)(4).

6. We find that News Corp.'s ownership of THC's "capital stock" exceeds the 25 percent foreign ownership benchmark established in Section 310(b)(4). THC wholly owns the licensee, FTS. Although News Corp. owns only 24 percent of the total number of outstanding shares of THC stock, News Corp. contributed over 99 percent of the capital invested in THC and is entitled to virtually all of the economic incidents of THC's operation. In these circumstances, we conclude that the statute requires us to evaluate not only the number of shares of stock held by alien owners, but also the amount of equity capital contributed by such owners. Such an approach effectuates the statutory objective, and will enable the Commission to perform a *bona fide* analysis of alien ownership. This decision is also consistent with the Commission's prior decisions, including the staff's unreported 1985 decision in American Colonial, and later Commission decisions, including Wilner & Scheiner and Univision.[3]

7. Even though FTS exceeds the ownership benchmark, we do not conclude that FTS intentionally misrepresented or concealed that fact. Although there are some disputed issues as to subsidiary or "proximate" facts, the totality of the evidence before us does not present a substantial and material question of fact on the ultimate issue of whether FTS misrepresented the facts or lacked candor in its 1985 transfer application or any of its subsequent filings with this Commission. We reach this decision after careful review of the voluminous documentary and testimonial evidence and the parties' lengthy submissions.

8. We recognize that our reported interpretations of Section 310(b)(4) at the time FTS filed its original application in 1985 did not clearly indicate that a foreign corporation's equity capital contributions were of decisional significance to the Commission in determining a *corporate* parent's compliance with the statutory benchmark. Thus, although the Commission had held that capital contributions were relevant in the limited partnership context, the totality of the circumstances leads us to conclude that FTS did not believe that it had a duty to disclose the amount of equity capital contributed to THC by foreign interests, and thus FTS did not intentionally conceal this information in an effort to deceive the Commission.

9. We further find that Murdoch, by virtue of his controlling voting interest in THC, exercises *de jure* control over that company and its wholly-owned subsidiary,

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[3] For a discussion of Commission precedent interpreting Section 310(b)(4), see ¶¶64-68, *infra*.

FTS. Moreover, the record shows that Murdoch was in charge of THC's day-to-day operations and dominated its corporate affairs. While FTS and THC are subsidiaries of News Corp. for financial reporting purposes, the totality of the evidence demonstrates that Murdoch, a United States citizen, nonetheless exercises *de facto* control over THC. We reject the contention that as a consequence of his position with News Corp., Murdoch is acting as a representative of alien interests.

10. As stated in ¶ 6, in this decision the Commission holds that News Corp.'s 99 percent capital contribution to THC exceeds the 25 percent benchmark. A licensee is permitted to exceed the benchmark, however, where the Commission expressly finds that the "public interest" would be served. Absent such a public interest finding, FTS must comply with the benchmark.

11. We have insufficient information on the record at this time to make a public interest determination in this case. Therefore, not later than 45 days from the release of this order, FTS may either proffer a showing of why non-compliance with the Section 310(b)(4) benchmark is in the public interest, or file a statement demonstrating how and by what date it will comply with the benchmark. Other persons may comment on FTS's submission 30 days thereafter. FTS may then reply to said comments in not more than 15 days. The Commission intends to rule promptly thereafter.

III. BACKGROUND

12. In May 1985, THC agreed to purchase six television stations from Metromedia, Inc. and affiliated companies.[4] THC later assigned its contract with Metromedia to FTS, a newly-created and wholly-owned subsidiary of THC, which on June 24, 1985, filed a series of applications (collectively, the "Application") for Commission approval of the assignment of licenses.[5]

13. The Application certified FTS's compliance with Section 310, supporting that certification with an exhibit describing the would-be licensee's proposed ownership

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[4] The six stations were WNYW-TV (formerly WNEW-TV) in New York City, New York; KTTV-TV in Los Angeles, California; WFLD-TV in Chicago, Illinois; WTTG-TV in Washington, D.C.; KDAF-TV (formerly KRLD-TV) in Dallas, Texas; and KRIV-TV in Houston, Texas.

[5] The Application was actually filed by FTS's corporate predecessor, News America Television, Inc. Because the names of many of the entities involved in this matter have changed over time, we will indicate the original entity name and its current name, but thereafter will refer only to the current name.

structure. MMB Ex.[6] 14 at 14-16. The exhibit declared that FTS, the licensee, would be wholly owned by THC, a domestic corporation, which in turn would be owned as follows:

> THC will issue two classes of stock, one common and one preferred. The preferred stock will exercise 76% of the vote on all matters; and the remaining 24% of the vote will be exercised by the common stock. The holders of the preferred shares will be entitled to a fixed return on capital investment. All other profits and losses of the Corporation will be attributable to the common shares.

MMB Ex. 14 at 14.[7]

14. Murdoch, then an Australian national seeking U.S. citizenship,[8] was to own all of the preferred stock of THC, and Fox, Inc. all of the common stock.[9] Fox, Inc., a domestic corporation, was wholly owned through various intermediary companies by News Corp., an Australian company. MMB Ex. 14 at 14-15. FTS asserted that Murdoch held *de facto* control of News Corp. by virtue of his position as its Chairman and a Director and his purported right to vote a controlling interest in two private investment companies that together were represented to hold 46 percent of News Corp.'s voting stock.[10]

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[6] "MMB Ex." will be used herein to refer to the exhibits compiled by the Bureau for use in its informal investigation into FTS's alleged lack of candor. All of the documents produced and sworn testimony gathered in the course of the investigation have been made part of the public record in this proceeding. Documents that are not exhibits are referred to by the production numbers assigned to them by counsel for FTS.

[7] In an October 2, 1985 amendment to the Application, FTS stated more particularly that 7,600 shares of preferred stock and 2,400 shares of common stock would be issued. MMB Ex. 18 at 5.

[8] Murdoch officially became a United States citizen on September 4, 1985, at which time FTS filed an amendment to its Application reflecting that fact.

[9] Fox, Inc. is the successor to News Group Publications, Inc.

[10] According to the Application, the companies were owned jointly by members of Murdoch's family and by various trusts established for the benefit of Murdoch and his family. MMB Ex. 14 at 15.

15. As required by FCC Form 314, the Application described the foreign sources of funds necessary to finance the transaction and for initial operating costs:

> To complete the proposed transaction, the assignee will be required to have available approximately $600 million above the assumption of existing debt. These funds will be provided through open credit lines in favor of [News Corp.] and its subsidiaries now available with American, European, and Australian banks. Any funds obtained from other than U.S. financial institutions will be borrowed by certain foreign subsidiaries of [News Corp.] and contributed as capital to the assignee. Funds obtained through borrowings from U.S. financial institutions will be made by [Fox, Inc.], a U.S. subsidiary of [News Corp.], and contributed as capital or loaned to the assignee.

MMB Ex. 14 at 37-38. The Application did not otherwise disclose whether the capital would be contributed to FTS in the form of debt, equity, or some combination.

16. The Commission granted the Application and approved assignment of the six Metromedia station licenses despite several petitions to deny, none of which squarely addressed the issue of News Corp.'s capital contributions to or ownership of THC under Section 310(b) that we face today.[11] The transfer was consummated on March 6, 1986, and one month later, FTS filed the requisite ownership report, see 47 C.F.R. § 73.315. The Ownership Report indicated that a total of $760,000 had been paid for the THC preferred shares, but it did not reveal a specific amount that had been paid for the common shares. MMB Ex. 13 at 15. Instead, in the space on the form in which that information would have been provided, FTS referred to an attached exhibit. The attached exhibit referred generally to the Asset Purchase Agreement between FTS and Metromedia. That agreement did not, however, disclose the amount of equity capital that would be paid by News Corp. for its shares of THC stock. See MMB Ex. 13 at 18. Since 1986, FTS has filed three applications for new stations and twelve renewal applications, certifying in each one that it is in compliance with Section 310.[12]

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[11] Metromedia Radio & Television, Inc., 102 F.C.C.2d 1334, 1337-40 (1985), recon. denied, 59 R.R.2d 1211 (1986), aff'd sub nom. Health & Medicine Policy Research Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986).

[12] FTS filed applications to acquire KSTU-TV in Salt Lake City, Utah, on November 11, 1989; WATL-TV in Atlanta, Georgia, on February 5, 1993; and WFXT-TV in Boston, Massachusetts, on October 13, 1994. It has filed the following renewal applications: WTTG-TV (May 30, 1986); WFLD-TV (July 31, 1987); KTTV-TV

17. The issues concerning FTS's foreign ownership and control that are now before us first arose in 1993, when Metro NAACP supplemented its petition to deny the application of an FTS subsidiary to acquire the license for WGBS-TV (Channel 57) in Philadelphia on the ground that News Corp. held *de facto* control of FTS. Combined Broadcasting, Inc., File No. BTCT-9310818KE (Supp. Petition filed Nov. 19, 1993). Metro NAACP based its allegation partly on News Corp.'s 1993 annual report to shareholders describing its interests in THC as "representing substantially all of the equity" of that company; Metro NAACP asserted that News Corp.'s equity contribution necessarily led to control. Metro NAACP also claimed that certain features of THC's preferred shares, such as mandatory redemption at par value, made those shares debt and not equity, thus undercutting Murdoch's claim of *de jure* control of FTS. In any event, Metro NAACP claimed, Murdoch himself was the representative of aliens by virtue of his corporate positions at News Corp.

18. In response, FTS asserted that it had fully disclosed the ownership and funding structure of THC in 1985, and that the Commission had reviewed and approved that structure; that Murdoch's THC stock conveyed corporate voting rights and therefore could not be considered to be debt; and that he voted his THC stock independently, and not as a representative of News Corp. These issues ultimately were not resolved in the Philadelphia proceeding, however, because FTS voluntarily dismissed its application before the Commission could act on it, thereby mooting the matter.[13]

19. Although the Philadelphia proceeding became moot, FTS expressly "request[ed] that the Commission address the issues raised by Petitioners which [*sic*]

(March 31, 1988); KDAF-TV (March 31, 1988); KRIV-TV (March 31, 1988); WNYW-TV (February 1, 1989); WTTG-TV (May 30, 1991); WFLD-TV (July 29, 1992); KDAF-TV (March 31, 1993); KRIV-TV (March 31, 1993); KSTU-TV (June 1, 1993); and this renewal application for WNYW-TV (February 1, 1994). In addition, a wholly-owned subsidiary of FTS filed an application to acquire WGBS-TV in Philadelphia, Pennsylvania, on August 18, 1993, but subsequently requested, and was granted, dismissal of the application. See ¶¶17-18, *infra*.

[13] Letter from William S. Reyner to Roy Stewart (Feb. 23, 1994). While the Philadelphia proceeding was still pending, the same foreign ownership issues were raised in proceedings on renewal of FTS's license for KTTV-TV, Los Angeles. We declined to reach the ownership issues in that case, however, because they were raised quite late in the proceedings and because they were to be considered in the course of the then-pending Philadelphia proceeding. Instead, we conditioned the grant of FTS's renewal upon the outcome of the alien ownership question. Fox Television Stations, Inc., 9 FCC Rcd 62 (1993), aff'd sub nom. Rainbow Broadcasting, Inc. v. FCC, No. 94-1060 (D.C. Cir. Mar. 21, 1995).

respect to the FTS ownership structure," Letter of February 23, 1994 from William S. Reyner to William Caton, and we continued to address Metro NAACP's allegations both on that request and on our own initiative.[14] Accordingly, on March 4, 1994, the Mass Media Bureau sent FTS a Letter of Inquiry seeking to establish "more precisely the equity ownership structure of FTS." MMB Ex. 6 at 1. Specifically, the Bureau sought: (1) a detailed description of all equity ownership (including the percentage of such ownership) in FTS held by aliens, including News Corp.; (2) an explanation of whether alien equity ownership differs among licensees in which News Corp. has an indirect ownership interest; and (3) a description whether and how Murdoch "is authorized to exercise voting control of [News Corp.]." Id.

20. FTS's March 21, 1994, reply stated that Murdoch, a United States citizen, owned all of THC's preferred stock, "constituting 76 percent of both the voting power and the capital stock of the company," and that Fox, Inc. owned all of THC's common stock, "constituting 24 percent of both the voting power and the capital stock of the company." MMB Ex. 7 at 1-2. The letter further stated that with the exception of the $760,000 paid for the preferred shares, "all funding to THC and FTS was supplied as intra-company loans or capital advances from News Corp. entities." Id. at 2. FTS did not expressly indicate what portion of that funding was provided in the form of equity and what portion in the form of debt. It stated, however, that "the amount of News Corp.'s equity funding contribution has always been in excess of 25 percent of THC's aggregate equity funding." Id. at 10. In response to the Bureau's question asking FTS to state the percentage of alien ownership, FTS answered that because there was no foreign influence over FTS, "the precise dollar value of News Corp.'s equity contribution at any given time would appear immaterial to the Commission's Section 310(b) analysis." Id. at 2. FTS also provided certain information about the various trusts through which Murdoch claimed to control much of the vote of News Corp.

21. On May 11, 1994, the Bureau issued a second Letter of Inquiry in which it requested "specific answers" to its earlier inquiries. MMB Ex. 8 at 1. The second Letter of Inquiry explained that FTS's reply to the first letter was incomplete because (1) it failed to specify the percentage equity ownership News Corp. and other aliens hold in FTS, and (2) it did not clearly explain how Murdoch exercised *de facto* control over News Corp.

22. FTS's May 23, 1994, response to the second Letter of Inquiry stated that News Corp. has "approximately a 99 percent economic/equity interest" in THC. MMB

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[14] See Booth American Co., 58 F.C.C.2d 553, 554 (1976) (withdrawal of petition to deny does not dispose of the issues raised by the petition; rather, the Commission must consider the merits of the petition).

Ex. 9 at 2. Even though FTS apparently recognized that it had never explicitly stated that percentage of equity, FTS asserted "it has always been recognized, even absent a specific percentage, that the common stock of THC represents virtually all of the corporation's aggregate economic/equity interest." Id. FTS also explained that it believed that even if the level of alien ownership were deemed to exceed 25 percent, its ownership structure had been approved by the Commission. Id. at 4-8. It relied on the Commission's general conclusion in 1985 that transfer of the licenses would serve the public interest, Metromedia, 102 F.C.C.2d at 1352, and on its own assertion that Murdoch held *de facto* control of News Corp. Finally, FTS explained additional information about the trust arrangements that allegedly gave Murdoch *de facto* control of News Corp. MMB Ex. 9 at 8-11.

23. In the meantime, on February 1, 1994, FTS had applied to renew its license for WNYW-TV, and Metro NAACP petitioned to deny the application. In a supplemental pleading, Metro NAACP reiterated the control issues that had been raised in the Philadelphia proceeding and added the charges that FTS lacked candor with respect to its alien ownership and misrepresented its compliance with Section 310.

24. After reviewing all of the above material, the Bureau concluded that the existing record on FTS's alleged lack of candor was insufficient to determine whether there was a substantial and material issue of fact that needed to be resolved at a hearing. One of the primary factual issues on which the record was insufficient arose from FTS's assertion that the Commission had in 1985 been made aware of the extent of News Corp.'s capital investment in THC, and had nonetheless determined and held *sub silentio* that alien ownership nearly far exceeding the 25 percent statutory benchmark level in FTS's parent company was in the public interest.[15] Accordingly, the Bureau decided to conduct an informal investigation to supplement the record with additional factual information upon which to base a recommendation on the candor issue.[16] The Bureau asked FTS to produce various documents related to the Application and FTS's understanding of Section 310; and propounded additional questions regarding the persons

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[15] In the comments and reply comments filed after the Bureau's investigation, FTS no longer presses the assertion that the Commission in 1985 made a public interest finding regarding ownership in excess of the benchmark. See ¶75, *infra*.

[16] See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621 (D.C. Cir. 1978) (*en banc*) (approving use of informal investigations to determine whether to designate a matter for hearing). In Fox Television Stations, Inc., FCC 95-40 (Feb. 6, 1995), we rejected Metro NAACP's request to terminate the Bureau's investigation. We also rejected Rainbow's request to intervene as a party to the investigation, but allowed it to file informal comments. Rainbow has appealed that decision. Rainbow Broadcasting, Inc. v. FCC, No. 95-1156 (D.C. Cir. filed March 8, 1995).

involved in the preparation of FTS's various applications, ownership reports, and responses to the letters of inquiry.[17] Subsequently, another document request and additional questions were served on FTS.[18] Eventually, FTS produced a number of documents that had been requested by the Bureau but initially withheld from production, while reserving the right to assert the attorney-client privilege with respect to those documents in the future.[19]

25. Bureau personnel took sworn testimony from 17 witnesses who presently or formerly worked for FTS and related companies, or who had performed legal services for FTS in connection with the Metromedia deal.[20] Bureau personnel also interviewed

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[17] Letter from Renée Licht to William S. Reyner, Jr. (Dec. 7, 1994).

[18] Letter from Renée Licht to William S. Reyner, Jr. (Jan. 4, 1995).

[19] See Letter from Renée Licht to William S. Reyner, Laura Blackburne, and David Honig (Jan. 13, 1995). FTS generally produced documents relevant to its filings with this Commission, as well as filings with other governmental agencies that reflected upon FTS's ownership structure; notes of meetings with Commission staff; and correspondence and memoranda discussing FTS's compliance with foreign ownership restrictions. FTS originally withheld from production approximately 300 documents based upon various claims of privilege. After the Bureau specifically identified 93 of those documents as to which the claimed privileges seemed particularly unfounded, FTS produced 52 additional documents, which FTS deemed not to be privileged after further review. FTS's agreement to produce additional documents while reserving the right to assert the attorney-client privilege in the future led to the production of 31 additional documents. FTS did not, however, waive its assertions of the work product doctrine, and accordingly continued to withhold over 200 documents.

[20] The following witnesses testified: Murdoch; Barry Diller, formerly President of Fox, Inc.; Chase Carey, current President of FTS; Molly Pauker, current Vice President for Corporate and Legal Affairs for FTS; Richard Sarazen, a former director of FTS; David DeVoe, a director of FTS; Brian Madden, Joel Levy, Howard Squadron, Arthur Siskind, Michael Gardner, James Denvir, and Elizabeth Hayes, all of whom served as outside counsel to FTS; Thomas R. Herwitz, formerly Vice President of Corporate and Legal Affairs for FTS; David Handelman, formerly Vice President and Secretary of THC and General Counsel of Fox, Inc.; Daniel Brennan, formerly Vice President for Taxation of News America Publishing, Inc.; and Larry Kessler, formerly General Counsel of News America Publishing. Metro NAACP asked that six additional persons be deposed, but the Bureau declined because it determined that those witnesses were not likely to provide information within the scope of the investigation. Bureau personnel questioned the witnesses and both FTS and Metro NAACP had the opportunity to suggest additional

and obtained written statements from 12 present and former Commission employees with knowledge of the original FTS application proceeding.[21]

26. The Commission waived 47 C.F.R. § 19.735-206 and FCC INST 1113.4[22] to permit current and former FCC employees to be interviewed concerning the Commission's 1985 decision to approve transfer of the licenses to FTS, and authorized release of all Commission documents related to the 1985 proceeding on the Application. Fox Television Stations, Inc., 10 FCC Rcd 2246 (1995). After that waiver, FTS obtained additional statements from Allen Glasser, Jerald Fritz, and Alan Aronowitz. Prior to the waiver, FTS had already obtained statements from James McKinney and Diane Killory, formerly legal adviser to Commissioner Dennis Patrick. All statements obtained by FTS were provided to the Bureau and Metro NAACP.

27. At the conclusion of the investigation, the parties submitted extensive comments and reply comments.[23] Metro NAACP reiterates its claims that FTS's alien

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questions for the staff to ask. In addition, by agreement, both FTS and Metro NAACP were permitted directly to ask three questions of each witness.

[21] The Commission employees who supplied statements were: Stephen Sewell, Assistant Division Chief of the Mass Media Bureau's Video Services Division in 1985; Allen Glasser, the Mass Media Bureau attorney responsible for drafting the 1985 Metromedia decision; Roy Stewart, currently Chief of the Mass Media Bureau and Chief of the Video Services Division in 1985; Clay Pendarvis, Chief of the Mass Media Bureau's Television Branch in 1985 and at present; Thomas Herwitz, a legal adviser to former Chairman Mark Fowler in 1985; James McKinney, Chief of the Mass Media Bureau in 1985; Robert Pettit, legal advisor to Commissioner Mimi Dawson in 1985; Jerald Fritz, Chief of Staff to Chairman Fowler in 1985; Alan Aronowitz, a Mass Media Bureau attorney who worked in the Video Services Division in 1985; K. Gordon Oppenheimer, a Mass Media Bureau attorney in 1985; and Jack Smith, General Counsel to the Commission in 1985. The Bureau provided copies of these statements to FTS and Metro NAACP. The Bureau also requested voluntary statements from the four commissioners who participated in the 1985 Metromedia decision, and received such a statement from former Commissioner Mimi Dawson. The other commissioners declined to submit statements for the record.

[22] The cited rules generally prohibit disclosure by Commission employees of any information, or any portion of the contents of any document, that is part of the Commission's records and that is not routinely available to the public.

[23] On March 9, 1995, Rainbow Broadcasting filed a "Further Objection and Petition for Relief." All of Rainbow's arguments have been raised by Metro NAACP, and so are

ownership greatly exceeds the 25 percent benchmark of Section 310(b)(4) and that FTS has engaged in a decade-long campaign of deception about its alien ownership, beginning with its assignment application in 1985 and continuing through the ownership report, the renewal applications, and even the Bureau's Letters of Inquiry. That behavior, Metro NAACP claims, presents a lack of candor so severe that FTS should be barred from holding any of its licenses. In addition, Metro NAACP again argues that FTS's ownership violates Section 310(b) because News Corp., not Murdoch, controls THC, and that even if Murdoch controls both News Corp. and THC, he does so as a representative of aliens. Although Metro NAACP originally requested that the application be designated for hearing pursuant to Section 309(e) of the Communications Act, it now urges that the license should be denied outright, without a hearing.

28. FTS maintains that there has been at all times full, consistent and candid disclosure of the nature and extent of foreign ownership. It claims that the exhibits to the Application combined with information in the 1986 Ownership Report made clear that Murdoch holds 76 percent of the voting stock of THC, while News Corp. holds 24 percent of the voting stock as well as substantially all of the equity interest in THC. It argues that its structure complies with Section 310(b)(4) because the statute regulates shares of stock and not capital contributions. FTS urges that even if its capital structure is deemed to exceed the 25 percent ownership benchmark, it must be considered to be in compliance with the statute until the Commission finds that the public interest would be disserved by permitting such ownership, a finding that FTS argues cannot be made. We now address these issues.

IV. PROCEDURAL STANDARDS

29. We assess each of Metro NAACP's allegations under the standard set forth in Astroline Communications Co. v. FCC, 857 F.2d 1556 (D.C. Cir. 1988), to determine whether the circumstances warrant a hearing. First, with respect to each issue we must determine whether, assuming all facts alleged by Metro NAACP to be true, it has set forth a *prima facie* case that the renewal of FTS's license would be inconsistent with the public interest, convenience, and necessity. If we find that showing has been made, we must then determine whether the evidence before us presents a "substantial and material question of fact" that precludes us from determining whether renewal of the license would serve the public interest, convenience, and necessity without a hearing. In making that determination, we "may, and indeed must, weigh against the allegations of the petition to deny the other evidence" before us, Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 395 (D.C. Cir. 1985), and determine whether "there is a substantial question of fact such that the totality of the evidence arouses a sufficient doubt on the

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addressed in full herein.

point requiring further inquiry." Metropolitan Council of Metro NAACP Branches v. FCC, 46 F.3d 1154, 1159 (D.C. Cir. 1995)(citing Citizens for Jazz, 775 F.2d at 395). In making that determination, "the balancing of disputed proximate facts is a matter for [our] judgment." Id.

30. We make those determinations in this case based on a substantial evidentiary record. As described more fully below, in addition to the facts presented in Metro NAACP's petitions to deny and FTS's responses,[24] we have before us FTS's responses to two Letters of Inquiry from the Mass Media Bureau, in each of which FTS responded to several questions about FTS's ownership. We also have considerable evidence gathered in the course of an investigation conducted by the Bureau to supplement the factual record on FTS's candor with respect to its foreign ownership.[25] That material includes FTS's responses to additional written questions; hundreds of documents, including assertedly privileged documents, produced by FTS pursuant to the Bureau's document requests; the testimony of 17 present and former FTS employees and attorneys who were involved in the events now at issue; and the sworn declarations of 12 present and former Commission personnel. Finally, FTS and Metro NAACP have each submitted lengthy comments and reply comments on the evidence and issues.

V. ALIEN OWNERSHIP OF FTS EXCEEDS THE BENCHMARK ESTABLISHED IN SECTION 310(b)(4)

31. Metro NAACP's contention that FTS lacked candor or affirmatively misrepresented facts is based on the fundamental assumption that FTS is not in compliance with the 25 percent statutory ownership benchmark established in Section 310(b)(4) of the Communications Act because News Corp. provided over 99 percent of the capital invested in FTS's corporate parent. FTS, however, asserts that it is now, and at all relevant times has been, in compliance with the benchmark because News Corp. holds only 24 percent of the shares of stock of THC. The material facts related to FTS's alleged non-compliance with the Section 310(b)(4) benchmark are undisputed, and therefore a hearing on this issue is not necessary. Washington Ass'n for Television & Children v. FCC, 665 F.2d 1264, 1270 (D.C. Cir. 1981).

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[24] Two Petitions to Deny are relevant: first, the Petition to Deny the WNYW license, and second, an earlier petition filed by Metro NAACP to deny an application by a wholly-owned subsidiary of FTS to acquire station WGBS in Philadelphia. We take official notice of the allegations contained in the WGBS petition in this proceeding.

[25] See Interim Procedural Order, File No. BRCT-940201KZ (MMB Dec. 7, 1994), modified, Second Interim Procedural Order, File No. BRCT-940201KZ (MMB Dec. 21, 1994).

32. As discussed in more detail below, we conclude that THC's foreign ownership exceeds the statutory ownership benchmark because approximately 99 percent of the company's equity capitalization was provided by a foreign corporation. In so concluding, we recognize that the Commission's prior decisions have directly addressed the relevance of capital contributions in determining compliance with the ownership limitations in the context of limited partnerships, and although the rationale of those decisions may also apply in the corporate context, no Commission decision has clearly explained how the ownership benchmark should be computed for corporations or the extent to which capital contributions may be material to that computation. Accordingly, in this decision, we set forth the legal basis for our conclusion that the amount of alien capital contributed to a corporation is a relevant consideration in deciding whether the ownership benchmark is exceeded and, in particular, why it is relevant to THC's corporate structure.

A. The Ownership Benchmark Applies to Beneficial Ownership Interests

33. The statutory benchmark at issue in this case applies to a "corporation . . . of which more than one-fourth of the capital stock is owned of record or voted by . . . a corporation organized under the laws of a foreign country." 47 U.S.C. § 310(b)(4). The issue here is whether News Corp., an Australian corporation, has an interest in THC's "capital stock owned of record or voted" that exceeds the benchmark.

34. FTS argues that the ownership benchmark percentage can only be computed by counting the number of shares of stock (regardless of class, voting rights, or relative value) that is owned of record by an alien individual or corporation, and then comparing that number to the total number of outstanding shares of stock issued by the corporation. In support of its interpretation, FTS points to the phrase "capital stock owned of record" and argues that "for legal and accounting purposes, the term 'capital stock' traditionally describes and includes all of the securities that represent equitable ownership of the issuing corporation's capital funds." FTS Comments at iii. FTS also argues that nothing in the legislative history or judicial case law provides any basis for the view that Section 310(b)(4) imposes a limitation on the amount of foreign capital contributions or beneficial equity holdings in corporations subject to the statute.

35. We agree with FTS that, in some contexts, counting the number of shares of outstanding stock owned of record by aliens yields an accurate assessment of the extent of alien ownership interests in a corporation. Thus, in some circumstances, it is an appropriate method for determining compliance with the Section 310(b)(4) ownership benchmark. We do not agree, however, that in all circumstances the method FTS advocates for determining ownership interests comports with common sense or congressional intent.

36. As discussed in detail below, in enacting the statutory language in question, Congress clearly indicated its concern with the extent to which aliens possess substantial ownership interests in corporations, in addition to and independent of alien voting interests. Using a simple "count the shares" approach may not accurately reflect the actual extent of alien ownership interests in a corporation, particularly when the corporation issues more than one class of stock, and those classes have widely divergent characteristics. Accordingly, to carry out Congress's intention that the extent of alien ownership interests be fairly evaluated, the Commission must construe the benchmark in a manner that considers factors in addition to the number of alien-owned shares of stock where the distribution of shares of stock is not proportionate to equity interests. Thus, the Commission should consider the amount of foreign capital contributions to a corporation in determining compliance with the statutory ownership benchmark.

37. First, the language of the statute and its legislative history amply support the proposition that in enacting Section 310(b)[26] Congress was concerned with the extent of alien beneficial interests, both in licensees and parent companies that control licensees. By its express terms Section 310(b) provides limitations on the amount of capital stock which can be "owned . . . or voted" by aliens. Because the statutory limitations are cast in the disjunctive, we previously concluded in our 1985 Wilner & Scheiner decision[27] that ownership interests in limited partnerships -- as opposed to voting interests -- are considered independently when evaluating compliance with the benchmark. See 103 F.C.C.2d at 519 n.37. Thus, for example, in the Reconsideration Order, we concluded that non-voting preferred stock "owned" by alien interests must be counted toward evaluating the benchmark, even if that stock possesses "none of the indicia normally associated with equity ownership." See 1 FCC Rcd at 13-14.

38. The legislative history confirms that through Section 310(b), Congress intended to expand the existing laws governing alien ownership of communications facilities to include new restrictions on ownership interests in corporations. While Section 310(b) was enacted in 1934 as part of the original Communications Act, its provisions pertaining to radio originated in the Radio Act of 1927, Pub. L. No. 69-632, §12, 44 Stat. 1162, 1167 (1927). Section 12 of the Radio Act barred the grant or

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[26] The benchmark was originally codified as Section 310(a)(5) of the Communications Act of 1934. It was renumbered to (b)(4) in 1974. See Pub. L. No. 83-505, § 2, 88 Stat. 1576 (1974). For convenience, we will refer to Section 310(b)(4), the current codification.

[27] Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as Amended, 103 F.C.C.2d 511 (1985) ("Wilner & Scheiner"), reconsidered in part, 1 FCC Rcd 12 (1986) ("Reconsideration Order").

transfer of a license to any company, corporation, or association "of which . . . more than one-fifth of the capital stock may be voted by aliens." The Radio Act's provisions thus barred alien ownership only of (1) the licensee's capital stock that (2) had voting power.

39. The Communications Act added significant additional restrictions on alien ownership. First, in order to address a perceived loophole in the law,[28] Congress decided to apply specific alien ownership restrictions to parent companies that controlled licensees and, for that purpose, ultimately enacted Section 310(b)(4). Second, and most pertinent here, Congress added a new restriction to the existing Radio Act benchmark language applicable to licensees (currently Section 310(b)(3) of the Act) which would limit ownership regardless of voting power, and used virtually the same benchmark terminology in the new provision that governed parent corporations (now Section 310(b)(4)). Thus, the new act placed restrictions on capital stock in licensees and their parent companies that was "owned of record or voted by aliens."

40. The new limitations on alien ownership and provisions concerning parent companies were enacted in large part due to the efforts of Captain S.C. Hooper, Director of Naval Communications for the Department of the Navy, who vigorously argued that protection of the United States's security and national defense interests required greater restrictions on alien ownership of capital stock than those in the Radio Act. Thus, in his testimony and submissions in both the House and Senate Committee Hearings leading to the Act, the Director offered extensive evidence on issues relating to foreign ownership and influence, and specifically advocated that "no more than one-fifth of the capital stock of any United States communication company, including holding companies, should be owned by aliens or their representatives, and foreign-owned stock should not be entitled to voting privileges."[29] In the end, Congress did not enact the strict prohibition on alien ownership through holding companies that had been championed by the Navy. Nor did Congress impose a complete ban on alien ownership of corporate stock with voting power. Instead, Congress decided to permit such foreign-held interests in corporate parents of licensees up to a 25 percent benchmark level and reserved to the Commission the discretion to reject alien voting or ownership interests above the benchmark if the

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[28] See 1 Hearings Before the Committee on Interstate and Foreign Commerce of the House of Representatives on H.R. 8301, A Bill to Provide for the Regulation of Interstate and Foreign Communication by Wire or Radio, and for Other Purposes, 73d Cong., 2d Sess. 44 (1934) ("House Hearings").

[29] E.g., House Hearings, at 23-24, 35, 51-53, 55.

Commission found that the public interest would be served by the refusal or revocation of such licenses.[30]

41. Commenting on this new benchmark standard, both the Senate Report and Conference Report make clear that the new ownership language, in contrast to the Radio Act's provision concerning voting power, was a specific, additional limitation that applies to stock ownership alone. See S. Rep. No. 781, 73d Cong., 2d Sess. 7 ("Senate Report"); H.R. Rep. No. 1918, 73d Cong., 2d Sess. 48 ("Conference Report"). The Conference Report, in contrasting the new benchmark standard of Section 310(b) with the restriction on voting stock in the Radio Act, stated that the "Senate bill changes [the Radio Act] by making the restriction apply also where one-fifth of the capital stock is owned of record by the designated persons and altering the words 'may be voted' to 'is voted.'" Conference Report at 48. Thus, the conferees explicitly recognized that the new act, in contrast to the Radio Act, "also" contained a new, independent restriction on ownership of capital stock. The Senate Report describes the benchmark as

> modif[ying] the present law by (1) refusing a station license to a company more than one-fifth of whose capital stock is owned of record by aliens, and (2) by changing the words "may be voted by aliens" in the present law to "is voted by aliens." The purpose of this is to guard against alien control and not the mere possibility of alien control.[31]

In Wilner & Scheiner, we discussed the Senate Report's language and concluded that the benchmark restriction on alien ownership was an independent restriction on ownership of capital stock, even where such ownership does not confer control. See 103 F.C.C.2d at 517 n.31. We also concluded in Wilner & Scheiner that the Senate Report's statement disclaiming an intent to address "the mere possibility of control" was not made in connection with the ownership benchmark, but relates instead to the modification in the voting benchmark. Id. We reaffirm that conclusion as well. The change in language from "may vote" to "is voted" is logically related to the Senate Report's distinction between alien control and "the mere possibility of control." The statement bears no logical relationship to the fact that the benchmarks were broadened to incorporate a new criterion based on ownership alone. We reaffirm that assessment. Against this background, it is apparent that Congress was fully aware of the implications of imposing restrictions on alien beneficial ownership of capital stock in communications companies and ultimately concluded that some additional restrictions were necessary. Therefore, in the absence of any express indication that Congress intended to constrain our authority, we conclude that Congress intended for us to construe the benchmark standard in a

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[30] Conference Report at 48-49; 78 Cong. Rec. 10978 (1934).

[31] Senate Report at 7.

manner that allows for a meaningful assessment of alien ownership interests in corporate licensees and parent companies. See Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 118 (1983) (in construing any statute, "our task is to interpret the words of the statute in light of the purpose Congress sought to serve").

42. FTS's insistence that we calculate the ownership benchmark only by counting the number of shares of stock issued to aliens, regardless of the class or nature of such stock, could, in some instances, yield results that bear no relationship to an alien's actual ownership interest in a corporate holding company or licensee. For example, a corporate applicant's parent company could issue four shares of stock, all of which vote, but three of which are purchased by United States citizens for $1 each, while an alien pays $1 billion for the remaining share. Under FTS's interpretation, this arrangement would comply with both the voting *and ownership* benchmarks of Section 310(b)(4). Presumably, FTS's approach would also find compliant an arrangement where the parent company issues two classes of stock with disparate voting attributes. For example, if United States citizens held three shares of Class A stock entitled to one vote per share, and an alien held one share of Class B stock entitled to three votes per share, the benchmarks would be satisfied under FTS's theory, since the alien's single share constitutes only 25 percent of the number of outstanding shares of "capital stock", notwithstanding its right to cast 50 percent of the votes.

43. Indeed, THC's own corporate structure provides a vivid example of the potential pitfalls of FTS's methodology. It would allow nominal compliance with the 25 percent statutory ownership benchmark, even though News Corp. has virtually all of the beneficial ownership interest in THC. We agree with FTS that it may be "highly unusual . . . for equity and voting control to reside in different entities." FTS Reply Comments at 74. Nevertheless, when those unusual circumstances do occur, we are not relieved of the obligation to determine the extent and significance of alien ownership interests. We cannot construe the statutory language in a manner that effectively eviscerates the statutory restrictions. Congress could not have envisioned every circumstance that might arise, and where a simple "count the shares" methodology leads to patently absurd results that defeat the congressional intent, we intend to fill any such voids in the law consistent with the underlying congressional purpose. See generally Public Citizen v. Department of Justice, 491 U.S. 440, 454 (1989)(where literal reading of a statutory term would compel an odd result, search must be made for other evidence of congressional intent to lend the term its proper scope).[32]

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[32] Similarly, to the extent that the benchmark's use of the term "capital stock" might be ambiguous, the term's meaning should be ascertained by reference "to the context, the nature and purpose of the statute, its history and other aids to construction." Ray Consol. Copper Co. v. United States, 268 U.S. 373, 376-77 (1925).

44. FTS also contends that Congress's overriding purpose in enacting Section 310(b) was to limit foreign influence and prevent control over licensees. It suggests, therefore, that so long as aliens do not have voting control, we should not be concerned with measuring the extent of alien ownership interests. FTS Comments at 11. We agree that guarding against undue foreign influence and control was an important congressional purpose in enacting Section 310. PrimeMedia Broadcasting, Inc., 3 FCC Rcd 4293, 4294 (1988). Nevertheless, as we concluded in Wilner & Scheiner, "[t]he specific citizenship requirements [of Section 310(b)] governing positional, ownership and voting interest reflects a deliberate judgment on the part of Congress as to the limitations necessary to prevent undue influence." See 103 F.C.C.2d at 517. We must remain faithful to those judgments in determining whether the benchmark thresholds have been met. As discussed more fully below, however, the Section 310(b)(4) benchmark is only a trigger for the exercise of our discretion, which we then exercise based upon a more searching analysis of the circumstances of each case.

B. Capital Contributions as "Capital Stock"

45. Because News Corp.'s true ownership interest in THC is not revealed by simple reference to the total number of shares of stock it holds, we must determine an alternative method for quantifying News Corp.'s ownership of THC's "capital stock." We believe that evaluating News Corp.'s equity capital contributions to the corporation, as we have evaluated limited partnership interests since Wilner & Scheiner, is the best way to quantify the extent of News Corp.'s ownership interest consistent with the congressional intent and the statutory language.

46. Using equity capital contributions to measure ownership interests in corporations is consistent with and reflects the customary method by which corporate ownership interests were measured at the time of Section 310(b)'s enactment. Traditionally, shareholders' ownership interests in corporations correspond to the amounts of their capital contributions. These contributions are acknowledged through the issuance of stock certificates or "shares" that represent those interests. This understanding of corporate structure is reflected in Supreme Court decisions issued around the time of enactment of the Radio Act, when Congress first used the term "capital stock" in limiting foreign ownership of radio stations. In a decision that exemplifies that understanding, Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 425 (1910), the Supreme Court explained that capital stock "is the capital upon which the business is to be undertaken, and is represented by the property of every kind acquired by the company. Shares are the mere certificates which represent a subscriber's

contribution to the capital stock, and measure his interest in the company."[33] That understanding of the significance of shares of corporate stock has not changed under modern corporate law. See 11 *Fletcher Cyc. of the Law of Private Corporations* §§ 5083 at 24, 5100 at 99-100.

47. Judicial decisions contemporaneous with passage of the statute thus demonstrate an expectation that the relative amounts of shareholder capital contributions would generally be reflected in the stock certificates issued to shareholders, and would measure shareholder ownership interests in corporations. It is likely that Congress had a similar expectation for the relationship between shareholders' capital contributions and the shares of stock issued to them. Accordingly, in those instances when computing the number of shares owned by aliens does not fairly reflect the extent of their ownership interests in a corporation, analyzing the capital contributed from foreign sources is necessary for us to evaluate the extent of alien interests. In this regard, we also note that the statutory language regarding capital stock "owned of record" is not in any way inconsistent with our decision to interpret the benchmark by reference to capital contributions in those instances in which a simple "count the shares" approach does not fairly reflect the extent of alien ownership interests. The legislative history shows that Congress added this language simply to ease the burdens of determining who owned stock in the large, existing multi-national corporations that would be affected by Section 310(b)'s new provisions concerning parent companies.[34] The language thus does not reflect any intention that the Commission should apply the benchmark standard in a manner that would permit licensees or their parent companies to avoid the alien ownership benchmark altogether simply by manipulating the classes or characteristics of corporate stock and numbers of shares that are issued.

48. In summary, it is evident from the legislative history of Section 310(b) that Congress intended the Commission to undertake a *bona fide* assessment of the extent of foreign ownership interests in corporations. Therefore, consistent with congressional intent, we shall construe the statutory benchmark language relating to capital stock in a

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[33] This decision was part of a line of tax cases in which the Supreme Court noted that "capital stock" is not necessarily the same as "shares" of stock. See Ray Consol. Copper, 268 U.S. at 377; Bank of Commerce v. Tennessee, 161 U.S. 134, 146 (1896), modified in other respects, 163 U.S. 416 (1898).

[34] See Hearings Before the Committee on Interstate Commerce, United States Senate, on S. 2910, A Bill to Provide for the Regulation of Interstate and Foreign Communications by Wire or Radio, and For Other Purposes, 73d Cong., 2d Sess. 122-27 (1934). In this case, THC's own records reflect both News Corp.'s ownership of all issued shares of common stock, as well as the equity capital contributed by News Corp. in connection with its ownership interest.

manner that permits a *bona fide* analysis. Where, as here, the ownership of corporate shares does not correspond to the beneficial ownership of the corporation, we will not be bound by a formalistic and formulaic "count the shares" approach that understates the true extent of alien ownership.

49. We recognize that in certain situations, equity capital contributions may not fairly measure the true extent of an ownership interest. For example, such a methodology might not reflect "sweat equity" invested by shareholders, or could present other problems when applied to widely-held corporations. Should such issues arise, we will evaluate them on a case-by-case basis.

50. In the case of THC's corporate structure, however, there is no question that the amount of News Corp.'s capital contribution is a fair representation of the true extent of News Corp.'s ownership interest. For example, through its indirect ownership of Fox, Inc., News Corp. has the right to substantially all of THC's profits and losses and also has the right to all of THC's assets upon its sale or dissolution, less Murdoch's relatively minimal capital contribution and any accrued dividend on his preferred stock. See MMB Ex. 9 at 3-4. Accordingly, we conclude that because foreign interests contributed more than 99 percent of the capital of all classes of THC stock issued, the level of alien ownership of THC greatly exceeds the 25 percent benchmark established in Section 310(b)(4).

C. Mechanics for Exercising Commission Discretion Under Section 310(b)(4)

51. This conclusion does not complete our analysis, however, since Section 310(b)(4) does not set an absolute limit on foreign ownership, but rather gives the Commission discretion with respect to foreign ownership of an applicant's parent company above the benchmark level, "if the Commission finds that the public interest will be served by the refusal or revocation of such license." FTS argues that this discretion may be exercised in order to *limit* foreign ownership, and that alien ownership that exceeds the benchmark is permitted until the Commission makes an affirmative determination to the contrary. Metro NAACP argues that the Commission must affirmatively exercise its discretion to *permit* foreign ownership in excess of the benchmark in the first instance.

52. It is clear that Section 310(b)(4) gives the Commission discretion with respect to alien ownership in excess of the statutory benchmark. It is equally clear that the statute requires that the Commission be made aware whenever foreign ownership could exceed the benchmark level, so that it can exercise that discretion. Congress identified 25 percent alien ownership as the point at which the Commission should render a public interest determination. If the Commission is to exercise its discretion in any meaningful way, it must be alerted to the fact that such discretion is at issue, and given sufficient

facts upon which to make the case-by-case analysis required. See, e.g., Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965)("it is needful that the regulatory agencies be alerted and fairly and fully informed upon the emergence of a situation identified as a pressure point by law or regulation"), cert. denied, 383 U.S. 967 (1966); Reconsideration Order, 1 FCC Rcd at 13 (case-by-case procedure ensures that Commission has facts necessary for meaningful public interest determination of questions arising under Section 310(b)(4)). The Commission must be given the opportunity to make a public interest determination specifically focused upon the implications of exercising its discretion *before* an ownership structure above the foreign ownership benchmark is vested with corporate prerogatives over a Commission licensee.

53. If the statute were construed as FTS proposes, it would create a presumption that alien ownership above the 25 percent benchmark is acceptable and in compliance with federal law whether or not specifically reviewed or considered by the Commission. Such a presumption would relieve applicants of the obligation of specifically informing the Commission that their ownership structure exceeded the benchmark, and could thereby deprive the Commission of the opportunity to carry out its statutory duty to determine the public interest.[35] As in all cases of statutory construction, we must look to the provisions of the entire statute, as well as its underlying object and policy. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987). In this case, the statutory policy is clear: foreign ownership above a certain level is of concern and must be scrutinized by the Commission. We must interpret the statute to effectuate the statutory design in terms of the policies behind its enactment, and to avoid an interpretation which would make such policies more difficult to fulfill. See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1108 (D.C. Cir. 1979), cert. denied, 446 U.S. 952 (1980). Accordingly, we hold that an applicant must specifically and directly inform the Commission that the ownership structure under consideration may exceed the foreign ownership benchmark, and that absent such explicit notification and an express finding by the Commission that allowing the applicant to exceed the benchmark is in the public interest, an applicant may not exceed the benchmark.

54. Having determined the process required to implement the statute, we have greatly reduced the practical distinction between discretion to limit foreign ownership over the benchmark and discretion to permit it. Once the issue is squarely presented by an applicant, the Commission is charged with determining whether alien ownership above the benchmark is or is not consistent with the public interest. In either case we must make a determination of the public interest, and grant or deny the license

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[35] See Galesburg Broadcasting Co., 6 FCC Rcd 2210 (1991)(transfer of voting stock without prior Commission approval "deprived the Commission of the opportunity to pass on the propriety of alien ownership which Section 310(b)(4) of the Act contemplates").

application based on that determination. But because our process requires submission of the issue to the Commission, failure to do so violates that process even if it does not technically violate the statutory restriction.[36]

55. It is worth noting that in the past the Commission has applied the statute as a presumptive restriction on foreign ownership absent an exercise of discretion, rather than allowing more than 25 percent foreign ownership unless and until the Commission imposes a limitation.

> Under Section 310(b)(4), the aggregate of alien equity interests in a parent corporation, which in turn controls a corporate licensee, may only amount to 25%, unless the Commission finds that the public interest would be served.
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> * * *
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> The provisions of Section 310(b)(4) expressly provide the Commission with discretion to allow levels of indirect alien ownership along a vertical ownership chain in excess of the statutory benchmarks.

PrimeMedia, 3 FCC Rcd at 4295.[37] Although the courts have never been asked to address the issue, they also appear to view the benchmark as a presumptive limit that may be exceeded only with Commission authorization granted in the public interest. See, e.g., Moving Phones P'ship L.P. v. FCC, 998 F.2d 1051, 1057-58 (D.C. Cir. 1993) (Section 310(b)(4) gives the Commission "discretion to depart from a specified level of control"), cert. denied, 114 S. Ct. 1369 (1994); Telemundo, Inc. v. FCC, 802 F.2d 513, 516 (D.C. Cir. 1986) (Section 310(b) "establishes percentage limitations on alien ownership, voting rights, and directorships"). Our holding today will have the

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[36] Thus, an existing licensee whose alien ownership rises above the benchmark in mid-license term through no action of its own is not in violation of the statute, yet must report its alien ownership to the Commission as soon as it becomes aware that the benchmark has been exceeded.

[37] See also, e.g., Univision, 7 FCC Rcd at 6673 (Section 310(b)(4) "limits alien ownership and Board membership to 25 percent"); Reconsideration Order, 1 FCC Rcd at 13 ("The fact that we have discretion to leave unchallenged alien investment above 25 percent in companies controlling a licensee does not negate our statutory obligation to scrutinize the relevant facts before affirmatively determining that the investment comports with the public interest"); Wilner & Scheiner, 103 F.C.C.2d at 524 ("the Commission has the statutory authority to evaluate whether or not, in a particular situation, it is in the public interest to permit a person to obtain or to hold a station license notwithstanding the fact that the alien interests in that station exceed the statutory benchmark").

same effect in practice, since an applicant whose beneficial alien ownership exceeds the benchmark level will have to alert the Commission to that fact, and the Commission will then either grant or deny the license based upon its analysis of the public interest. Therefore, an applicant will be allowed to exceed the Section 310(b)(4) benchmark only after prior consideration by the Commission.

VI. ALLEGED MISREPRESENTATION AND LACK OF CANDOR

56. Having found that FTS's foreign ownership exceeds the statutory benchmark, we must consider whether FTS either misrepresented its compliance with Section 310 in 1985 and in its various applications and filings since 1985, or lacked candor with the Commission concerning the extent of its alien ownership and control.

A. The Parties' Contentions

57. Metro NAACP alleges that FTS deliberately concealed its true ownership structure in all of its representations to the Commission from 1985 until 1994. According to Metro NAACP, this pattern of misconduct was intended to mislead the Commission as to the true extent of alien ownership and control and thereby falsely represent that FTS was in compliance with the benchmark of Section 310(b)(4). As discussed more specifically below, Metro NAACP argues that FTS failed to disclose that THC's preferred stock, which exercises 76 percent of the corporate vote, accounts for less than 1 percent of THC's equity, while the alien-owned common stock, which exercises only 24 percent of the vote, accounts for more than 99 percent of the equity. Metro NAACP contends that the non-disclosure was deliberate and that FTS knew that the relative equity contributions represented by the preferred and common shares was significant in the Commission's determination of compliance with Section 310(b). That intentional failure to disclose relevant information, Metro NAACP argues, continued until May 1994, when FTS for the first time disclosed that News Corp. holds more than 99 percent of FTS's equity.

58. FTS responds that at all times since 1985 it has provided full, complete and accurate information about its ownership structure. FTS claims that the 1985 Application plainly indicated that News Corp. would have a substantial equity stake in FTS, for it stated that News Corp. would contribute all of the funds required to finance the transaction and that the common stock would be entitled to all corporate profits and losses. Those facts, according to FTS, necessarily lead to the conclusion that News Corp. would invest substantial equity in FTS. FTS asserts further that its representatives held extensive discussions with Commission staff both before and after grant of the Application, which ensured that the staff was fully aware of News Corp.'s equity interest. FTS claims that neither legal precedent nor staff inquiry indicated in any way that FTS should provide additional information on News Corp.'s contribution of capital.

B. Legal Standards for Misrepresentation and Lack of Candor

59. A licensee's duty of candor is critical given the FCC's many duties. "The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for [periodic] renewal[s] . . . . As a result, the Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." RKO General, Inc. v. FCC, 670 F.2d 215, 232 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). There is thus no question that an applicant's candor is an issue of the utmost importance to us. Lack of candor takes two basic forms: (1) misrepresentation, which involves false statements of fact; and (2) failure to disclose, which involves concealment, evasion, or other failures to be fully informative. The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994). Relevant information is defined as information that may be of "decisional significance." RKO General, 670 F.2d at 229. The duty of candor can be breached both by affirmative misrepresentations and by a "fail[ure] to come forward with a candid statement of relevant facts," id., "whether or not such information is particularly elicited" by the Commission or its staff, Swan Creek, 39 F.3d at 1222.

60. A party's "intent to deceive" is, however, an "essential element" of a violation of the duty of candor. Swan Creek, 39 F.3d at 1222; accord Garden State Broadcasting Ltd. P'ship v. FCC, 996 F.2d 386, 393 (D.C. Cir. 1993); Fox River Broadcasting, Inc., 102 F.C.C.2d 1179, 1196 (1986). It therefore follows that before an applicant or licensee may be found to have withheld relevant information, it must be shown that the party knew that the information was relevant and intended to withhold it. See Abacus Broadcasting Corp., 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993) (no lack of candor where filing was misleading, but made without intent to deceive).

61. Metro NAACP's allegations present a *prima facie* case, since they allege particularized facts that, if true, would amount to a serious breach of trust that would be relevant to FTS's basic qualifications as a licensee.[38] To determine whether to renew FTS's license for station WNYW-TV, we must therefore decide whether there is a "substantial and material question of fact" as to whether FTS sought intentionally to conceal material information, or whether there is any other reason that precludes us from finding that renewal of the license would serve the "public interest, convenience, and

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[38] See Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1210-11 (1985), recon. denied, 1 FCC Rcd 421 (1986), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991).

necessity." If there is, we must designate the renewal application for hearing. 47 U.S.C. § 309(e).

62. We find that although there are some disputed issues concerning certain subsidiary or "proximate" facts, the totality of the evidence before us does not present a substantial and material question of fact on the ultimate issue of FTS's candor toward the Commission. We reach this decision after careful review of the voluminous record and the parties' lengthy submissions.

63. We will discuss each incident of alleged misrepresentation or lack of candor in turn: FTS's 1985 Application to acquire the Metromedia stations, its post-consummation Ownership Report in 1986, FTS's various renewal applications in the period after 1988, and FTS's responses to the Mass Media Bureau's Letters of Inquiry in 1994. At the outset, it will be useful to frame our discussion by briefly summarizing the development of Commission precedent interpreting Section 310(b).

C. A Brief History of the Commission's Construction of Section 310(b)

64. Because FTS's intent turns to some degree on the state of the law at the time it filed various applications, we provide a brief discussion of the chronological development of the Commission's application of Section 310(b). Prior to the time that FTS filed its applications, the Commission's reported decisions relating to compliance by corporate applicants with Section 310(b) determined the amount of alien-held "capital stock" by calculating the percentage of the outstanding shares of stock owned of record by aliens.[39] Indeed, the evidence in this case indicates that in 1985 the staff typically did not inquire about relative equity contributions to an applicant's corporate parent with only voting securities, such as THC. Declaration of Alan Glasser, Mass Media Bureau staff attorney, (Jan. 31, 1993) ¶ 5.[40] Neither did the application form ask the applicant to specify the source of capital contributions to its corporate parent.

65. In a 1985 decision released the day *after* FTS filed its Application, the Commission held with respect to limited partnerships and other *non-corporate* entities that the term "capital stock" should be interpreted "to encompass the alternative means

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[39] E.g., Data Transmission Co., 59 F.C.C.2d 909, 910 (1976) (Section 310(b) satisfied where foreign investor owned 9.5 percent of licensee's shares and 9.67 percent of parent's shares, despite providing additional funding through convertible debt); Westinghouse Radio Stations, Inc., 19 F.C.C. 1359, 1451 (1955) (22.42 percent foreign ownership of shares issued by parent corporation within benchmark).

[40] Sworn declarations from staff members involved in the initial licensing matter were collected in the course of the staff's investigation. See footnote 21, *supra*.

by which equity or voting interests are held in these businesses." Wilner & Scheiner, 103 F.C.C.2d at 516. The Commission applied this definition of "capital stock" in holding that the foreign ownership interest in a limited partnership should be defined "in terms of the equity contributions of the limited partners." Id. at 520 n.42.

66. Our conclusion in Wilner & Scheiner relied for certain propositions on an *unpublished* letter ruling issued in January 1985 by the Mass Media Bureau to American Colonial Broadcasting Corporation ("American Colonial").[41] That staff ruling involved a proposed corporate ownership structure in which the vast majority of the necessary capital would be contributed in return for non-voting preferred stock, but the common stock would nonetheless hold all of the voting power. The Bureau concluded that the proposed ownership structure exceeded the 25 percent benchmark established by Section 310(b)(4). As an independent ground for its conclusion,[42] the Bureau determined that the total capital invested by a foreign investor, as a percentage of the total capital invested in both classes of stock combined, would be 28.7 percent, and therefore in excess of the benchmark standard for foreign ownership. American Colonial at 5.

67. Upon reconsideration of Wilner & Scheiner in October 1986, the Commission further refined the concept of "capital stock" in two important respects. First, the Commission held that non-voting preferred stock could not be disregarded in determining compliance with Section 310(b)(4), even if the applicant certified that such stock contained none of the indicia normally associated with equity ownership, because the term "capital stock" encompasses various classes of stock, including preferred stock. Reconsideration Order, 1 FCC Rcd at 13-14. Second, the Commission confirmed that it would define ownership interests in a limited partnership in terms of the equity contributions of limited partners, rather than in terms of their partnership share, in part because the allocation of partnership shares had the potential for manipulation and could seriously understate the actual equity interest held by an alien. Id. at 14.[43]

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[41] In Wilner & Scheiner, we cited to American Colonial on points unrelated to the use of capital contributions to determine compliance with the ownership benchmark. See 103 F.C.C.2d at 517 n.32, 519 n.37. The same is true for our citation of that letter ruling in Univision, *infra*. See 7 FCC Rcd at 6679.

[42] The Bureau's first ground for rejecting the proposed ownership structure was the fact that a total of 27.28 percent of the common stock -- the only voting stock -- was attributable to aliens. American Colonial at 3-4.

[43] In PrimeMedia Broadcasting, Inc., 3 FCC Rcd 4293 (1988), we extended the rationale of Wilner & Scheiner to irrevocable voting trusts for corporate stock with foreign beneficiaries, since "we do not believe that Congress intended to exclude equitable ownership interests which do not confer actual control from the scope of

68. The first published decision to examine alien equity holdings in order to evaluate corporate compliance with Section 310(b) was Univision Holdings, Inc., 7 FCC Rcd 6672 (1992), recon. denied, 8 FCC Rcd 3931 (1993). There, the Commission determined compliance with Section 310(b) based in part upon the combined equity contributions of alien investors in the corporate holding companies of two proposed licensees. A United States citizen was to have 75.12 percent of the voting stock of the licensees' parent corporations, and two foreign corporations were to vote 12.44 percent each. Id. at 6673. In determining that the proposed corporate structure was "fully consistent with" the benchmark established in Section 310(b)(4), however, the Commission also specifically found that the combined *capital contributions* to the corporate parents were made 75.8 percent by the United States citizen, and 12.1 percent by each of the foreign corporations. Id. at 6673 n.6.

69. With this background in mind, we proceed to an evaluation of FTS's alleged lack of candor over the last decade.

D. FTS's 1985 Application

1. The Parties' Contentions

70. Metro NAACP alleges that FTS's deceptions about its foreign equity ownership began with its initial applications to acquire the Metromedia stations in 1985. Metro NAACP contends that in 1985 News Corp. knew that the Commission would examine an applicant's equity structure in order to determine compliance with Section 310(b), but the Application neither disclosed directly that News Corp. would hold all of the equity in the proposed enterprise nor made it possible for the Commission to determine the relative equity interests of the foreign and domestic investors.

71. Two exhibits to the Application are pertinent to Metro NAACP's argument. First, Exhibit 1, which described the proposed ownership structure, disclosed that Rupert Murdoch would exercise 76 percent of the vote through his ownership of THC's preferred shares and that News Corp. (through subsidiaries) would have 24 percent of the vote through its ownership of THC's common shares. It indicated that the preferred stock would be entitled to an unspecified fixed return and that all remaining profits and losses would be attributed to the common stock. Exhibit 1 mentioned nothing about the price that would be paid for either class of stock, the relative capital contribution between the two classes, or the benchmarks of Section 310.

Section 310(b)." Id. at 4295.

72. Second, Exhibit 2 to the Application, called the "Source of Funds" exhibit, indicated that to complete the proposed transaction, THC would require approximately $600 million (above the assumption of debt), to be provided by various unidentified subsidiaries of News Corp. Exhibit 2 further stated that any money borrowed from foreign banks would be contributed as capital, and any money borrowed from domestic banks would be contributed either as capital or as debt. The exhibit did not, however, specify what proportion of the money would take which form. Moreover, like Exhibit 1, the Source of Funds statement does not reveal how much would be paid for either class of stock or the relative capital contributions, nor does it discuss the Section 310 benchmarks.

73. Metro NAACP contends that the two exhibits fail to describe accurately the structure of FTS because they leave ambiguous the critical issue of relative equity contributions between the two classes of stock. Metro NAACP asserts that the inadequate disclosure was deliberate, because under the law as it existed in mid-1985 FTS knew that the Commission considered equity contributions to be relevant in assessing compliance with the alien ownership benchmarks, and because a credit facility under which News Corp. planned to borrow the money required News Corp. to provide the funds as capital and not as debt. Thus, claims Metro NAACP, the Application deliberately obscured the extent of alien equity ownership in THC.

74. FTS's response to this charge has taken various forms. In the course of the Philadelphia proceeding, FTS made two arguments, one that it has continued to press and one that it no longer advances. The first argument, which FTS has always maintained, is that the Application "made it clear from the outset that News Corp. . . . would indirectly provide substantial equity to THC." MMB Ex. 31 at 8. FTS bases that argument on its disclosures that News Corp. would contribute the entire $600 million needed to close the transaction and would be entitled to all of the profits and losses of the licensee. The second argument is that "notwithstanding the substantial foreign equity ownership of THC, the proposed structure was not inconsistent with the public interest," id at 9, and that when the Commission approved the Metromedia transaction, it necessarily approved THC's alien equity level, id. at 12-13. That argument implies that FTS had informed the Commission that foreign ownership of THC exceeded the 25 percent threshold and that the Commission had approved the overage.

75. In its current pleadings, FTS has replaced its earlier second argument with the assertion that it is and always has been in compliance with Section 310(b), because that section governs only alien-owned *shares* of stock and does not limit the amount of foreign *equity capital* in a Commission licensee or its corporate parent. Thus, FTS now argues that its equity structure was not relevant to the Commission's approval of the Application, and FTS could not have had any intent to withhold relevant information.

76. We find that FTS did not intentionally lack candor in its 1985 Application, but on grounds somewhat different from those FTS has put forward. We find that the level of News Corp.'s equity capital contribution to THC was not clearly revealed in the Application, and that the Commission staff did not glean that fact from the other information disclosed. Nevertheless, we determine that any deficiency in the information provided does not reflect an intent to deceive because, under the state of the Commission's reported precedent in 1985, a reasonable applicant would not have been on notice that alien capital contribution was a material consideration. Thus, even though FTS failed to provide that information, the failure did not constitute a culpable lack of candor.

2. The Efficacy of FTS's Disclosures

77. Initially, we reject FTS's contention that the Application fully revealed the extent of alien equity contributions, as well as its argument that the Commission understood or approved the level of alien ownership. The Application does not expressly state that a foreign company would contribute more than 99 percent of the licensee's equity. Rather, although the Application indicates that News Corp. would supply the requisite funds, it does not state whether those funds would be provided as equity or debt, and we see no way in which to divine the extent of News Corp.'s capital contribution to THC. The distinction between equity and debt is a crucial one; because creditors do not possess an ownership interest, the Commission does not consider debt interests in determining compliance with the statutory ownership benchmark. Wilner & Scheiner, 103 F.C.C.2d at 519.[44] To the extent that one can determine anything about alien equity from the application, that is possible only by closely analyzing isolated parts of the Application and drawing an appropriate inference. That is precisely the type of inferential analysis the Commission should not have to perform. See WADECO, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir. 1980) (burden is on the applicant to supply all information and not on the Commission to infer significant additional information).

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[44] FTS has also submitted a "representative sample" of contemporaneous articles from the popular and trade press in 1985 to support its assertion that, "from the earliest public disclosures of the transaction, it was common knowledge that [News Corp.] would provide the funds necessary to complete the acquisition. See Letter from William S. Reyner to Charles Dziedzic (Feb. 3, 1995). To the extent the proffered articles discuss funding of the transaction, they, like the Application itself, provide no information concerning relative equity capital contributions and therefore do not support the contention that the precise financial details of the transaction were "common knowledge." Indeed, many of the articles indicate that Murdoch himself would provide the money to fund the acquisition.

78. Although FTS has focused on a small number of exhibits to the three-inch-thick Application, it is important to bear in mind that the issues involved in processing the application were complex and largely unrelated to alien ownership, such as television/newspaper cross-ownership, the sufficiency of financial certifications, and the sufficiency of disclosures of planned changes in programming. Metromedia, 102 F.C.C.2d at 1339-40. For that reason, we reject the conclusions of FTS's "expert," Professor Marvin Chirelstein, that the conclusion that News Corp. would provide "the vast preponderance of the equity funding to be received by THC . . . as paid-in capital" was "perfectly evident on a plain reading of the 1985 Applications and related documents." FTS Comments, Appendix A at 4. Professor Chirelstein reviewed only a fraction of the documents submitted to the Commission focussing on the single issue of alien capital contributions, and reached his conclusion with the benefit of hindsight. Our candor requirements cannot be judged by such a standard. Moreover, Professor Chirelstein's opinions are based in part upon information concerning the nature and extent of Murdoch's investment in THC that had *not* been made available to the Commission at the time it had the Application under consideration.

79. It appears that the Commission staff did not understand at the time of the Application that 99 percent of the equity capital would be supplied by News Corp. For example, Roy Stewart, Chief of the Video Services Division in 1985, stated in a declaration that "[a]t no time was I aware the News Corporation would own 99 percent of the licensee's equity." Stewart Dec. ¶3. Stephen Sewell, then Assistant Chief of the Video Services Division, has similarly stated that he did not know the extent of the foreign equity holdings. Sewell Dec. ¶4.[45] Alan Glasser, the Commission employee who drafted the Metromedia decision, likewise stated that he did not know in 1985 that News Corp. would hold 99 percent of the equity. Glasser Dec. (Jan. 12, 1995) ¶4. See also Aronowitz Dec. ¶2 ("I do not recall having an impression as to whether the funds contributed by News Corp. would be in the form of equity or debt."); Fritz Dec. (Jan. 13, 1995) ¶5 (no recollection of discussions about how licensee was funded or debt/equity question).

80. Our assessment of the staff's beliefs in 1985 is not undermined by supplemental declarations submitted by two staff members. In the second declaration of Alan Glasser, he states that he "now recall[s]" that "News Corp. (through various subsidiaries) was to put up all the required cash and would receive all of the profits and losses;" and that the Application "clearly showed that control was to rest with Mr. Murdoch and that News Corp. would have all the equity benefits and risks in exchange

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[45] Had they known of the extent of alien equity, Stewart would have inquired further about News Corp.'s interests, while Sewell stated he would have recommended against granting the Application. See Stewart Dec. ¶3; Sewell Dec. ¶4.

for putting up all the money." Glasser Dec. (Jan. 31, 1995) ¶¶3, 4.[46] The second affidavit does not contradict the first one because the first involves Glasser's recollection of what he knew in 1985, while the second involves how Glasser now regards the Application after a detailed briefing by counsel for FTS and a review of relevant documents. That reasoning also applies to the Jerald Fritz, who was Chief of Staff for Chairman Mark Fowler in 1985. In any event, we agree with Metro NAACP that the issue is not whether the application disclosed facts from which with some effort relevant information could be derived, but whether the relevant information was disclosed forthrightly.

81. Our conclusion that Commission employees apparently did not know the extent of alien equity capital contributions is buttressed by the Commission's decision approving the acquisition, which is wholly devoid of any discussion of the matter. Neither was the issue squarely raised by any of the petitioners to deny,[47] or addressed in the staff's memorandum briefing the Commission on the case. Nor apparently did any Commission employee ask any questions about foreign equity, though with the benefit of hindsight the Application seems to invite further questions. Nothing else in the record indicates in any way that any Commission employee was aware of the extent of foreign equity contributions to FTS at the time the Application was processed and approved.

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[46] Other Commission employees, including James McKinney and Jerald Fritz, have indicated their recollection that Murdoch's *de facto* control of News Corp. assuaged any Commission concerns about alien influence over the licensee. McKinney Dec. ¶3; Fritz Dec. (Jan. 13, 1995) ¶5. We note, however, that the Metromedia decision makes no explicit finding that Murdoch has *de facto* control of News Corp., although it states that Murdoch "controls" FTS, that 46 percent of News Corp.'s stock is "controlled by and for the benefit of the Murdoch family" through a trust, and that no other shareholder holds more than 5 percent of News Corp.'s stock. See 102 F.C.C.2d at 1336-37.

[47] FTS asserts that one of the petitions to deny filed in 1985 contested the level of foreign investment in THC and FTS. The cited petition alleged that, "[a]lthough Murdoch is the controlling party, a substantial interest in the proposed transferee will be held by a publicly traded Australian company." Doc. A-10 at 3. The Application itself clearly states that News Corp., an Australian company, will hold 24 percent of the voting stock of THC, which gives the company "a substantial interest" in THC and FTS. It is significant that the above quotation from the petition appears in the "Citizenship" section of the petition, and not in the later "Source of Funds" section. Doc. A-3 at 5. Had FTS truly felt that this petition to deny raised an issue as to the source of its capital, it would have addressed that issue in its contemporaneous response -- which is silent on the issue. See Doc. J-6. Therefore, we find this assertion to be erroneous.

3. The State of the Law in 1985

82. Despite our conclusion that the Application did not plainly disclose the extent of News Corp.'s equity capital interest in THC, we do not find that the record presents a substantial and material question concerning whether FTS intentionally concealed the extent of alien capital contribution in connection with its Application in 1985. Metro NAACP's argument is predicated on the theory that in 1985 the state of the law was such that FTS knew or should have known that the Commission used relative equity contributions, rather than relative stock shares, in determining a corporate licensee's compliance with the 25 percent threshold of Section 310(b)(4). We find that our reported decisions at the time the Application was filed would not necessarily have led a reasonable applicant to that conclusion and that FTS did not in fact draw that conclusion. Thus, in reaching a decision regarding FTS's candor, we draw distinctions between first, the actual state of the law, as revealed in both reported and unreported Commission decisions; second, what a reasonable applicant could be expected to know about the law; and third, what FTS in fact knew about the law at the time.

83. At the outset, we note that in 1985 the staff's unreported decision in American Colonial determined that equity capital contribution was a relevant consideration in calculating alien participation in a corporate context. Thus, case law at the staff level in 1985 was that equity contribution was a relevant measure of ownership for purpose of determining compliance with the alien ownership benchmarks in Section 310(b) of the Act. For purposes of a candor determination, however, this conclusion is not sufficient, for it is what an applicant could be reasonably charged with knowing about the law and what it actually knew that inform our view of an applicant's intent and thus our view of its candor.

84. We turn now to those latter two considerations. We conclude that in 1985 when it planned its corporate structure and when it described that structure to the Commission, FTS was entitled to rely on the Commission's reported decisions concerning alien equity participation in the corporate context, which had to that point in time looked to the number of shares held and not to equity contributed.[48] Thus, with 76 percent of the shares of THC stock owned by U.S. citizens and 24 percent of those shares owned by aliens, it was not unreasonable for FTS to believe that it fully complied with the 25 percent benchmark established in Section 310(b)(4). Indeed, multiple attorneys who helped prepare the Application have testified that they believed FTS to be in compliance with the Section 310(b)(4) benchmark, regardless of News Corp.'s equity

[48] There is no indication that those reported decisions involved any disparity between the relative number of shares held and the relative amount of capital contributed to the corporation. See footnote 39, *supra*.

contribution.[49] And as noted, no Commission employees appear to have focused on the issue in 1985. We thus agree with FTS that at the time of its Application, a reasonable person could not have been expected to know that the percentage of alien equity in a corporation, as opposed to the percentage of shares of stock, was of "decisional significance." Accordingly, FTS cannot be found to have lacked candor to the extent it did not provide that information in 1985.

85. We disagree with Metro NAACP's contention that in 1985 the law "gave clear notice that equity contribution was material." Rep. Comments at 56. Although the January 1985 American Colonial letter ruling was written before FTS filed its Application, we find that American Colonial would not have put a reasonable applicant on notice that the Commission considered equity contribution relevant to the statutory benchmark. Because the letter ruling was an unreported advisory letter, notice of the decision cannot be automatically attributed to licensees. Just as important, the evidence indicates that FTS attorneys in fact were not aware of American Colonial in 1985. Levy Dep. at 21; Siskind Dep. at 45-46. In the circumstances, we find both that FTS was unaware of the American Colonial decision and that a reasonable applicant in 1985 could not be charged with knowledge of that unreported ruling. See 47 C.F.R. § 0.445(e) (unpublished documents "may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question").

86. We also disagree with Metro NAACP's further contention that Wilner & Scheiner, released the day after the Application was filed, "clearly confirms that the limitations on 'capital stock' ownership apply to alien equity contribution," and that FTS therefore should have disclosed its relative equity structure when it twice amended its Application after June 1985.[50] In Wilner & Scheiner, we responded to a petition for declaratory ruling asking us to hold that limited partnership interests would not be counted as "capital stock" for purposes of determining whether a licensee was in compliance with the Section 310(b) ownership benchmarks. We rejected that request and held instead that *limited partnership interests* are subject to the foreign ownership benchmarks even though they are not corporations and therefore do not have "capital

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[49] Squadron Dep. at 66-67; Siskind Dep. at 28, 34; Levy Dep. at 29, 31, 40-41; Madden Dep. at 28; Denvir Dep. at 34-35; Hayes Dep. at 39-40.

[50] Metro NAACP argues that the use of words such as "equity" and "control" in handwritten notes of FTS attorneys proves that they knew that the Commission would draw a distinction between debt and equity for the purpose of determining compliance with the benchmark of Section 310(b). See MMB Exs. 20, 21. We do not draw the same inference from those notes in light of our foregoing discussion of the state of the law. At the time of the 1985 Application, there is no reason to believe that FTS would have known of the future evolution of our case law.

stock" within the literal meaning of the statute. In the absence of actual capital stock, we decided, benchmark compliance would be determined based upon the limited partners' contributions to the equity of the licensee. See 103 F.C.C.2d at 515-16. On its face, therefore, the ruling pertains only to limited partnerships.

87. The ruling, though it cited the unreported American Colonial decision, does not in any way discuss how ownership interests should be calculated for corporate applicants, let alone hold that such interests must be determined on the basis of relative capital contributions. We thus believe that a corporate applicant in 1985 could reasonably have believed equity contributions to be immaterial to the Commission's consideration of an application.[51] Indeed, in the course of this renewal proceeding, Metro NAACP itself has argued to us that "the full Commission has never explicitly stated that equity contribution must be arithmetically calculated in the context of acquiring a corporate licensee." Supplement to Petition to Deny at 6 n.1.[52]

88. That is not to say that Wilner & Scheiner would not have led an applicant or its counsel to surmise that the Commission, at some point, might well conclude that equity contribution would be deemed relevant to determining the benchmark compliance of a corporate applicant or licensee.[53] Indeed, as discussed below, FTS's counsel came

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[51] We disagree with Metro NAACP's contention that the petition for a declaratory rulemaking that led to the Wilner & Scheiner decision, which counsel for FTS had read and discussed, by itself was sufficient to put FTS on notice that equity was pertinent. The petition, like the opinion it produced, addresses only limited partnerships. We also disagree with the argument that simply because Wilner & Scheiner cites the unreported American Colonial letter in several footnotes, FTS should have known about the Bureau's decision in that matter. Just as important, nothing in the record indicates that FTS in fact was aware of the American Colonial decision.

[52] We also note that in 1985 FTS appears to have considered various forms of ownership, such as limited partnerships (MMB Ex. 17) and voting trusts (MMB Ex. 25), see Siskind Dep. at 16 (both), but rejected them due to problems of alien equity ownership (Levy Dep. at 39 (voting trusts); Squadron Dep. at 23 (limited partnership)), which suggests that at the time FTS and its counsel believed that Wilner & Scheiner applied only to limited partnerships. See also Siskind Dep. at 22 (in 1985 "we believed as a matter of law that it didn't make any difference how the money went into the company"); id. at 18, 36.

[53] For example, in a 1990 law review article relying solely on an analogy to Wilner & Scheiner, the authors wrote that "equity ownership among classes of stock for a recently incorporated company may be determined by the proportion of paid-in capital or equity contribution." R. Gavillet, J. Foehrkolb, & S. Wu, *Structuring Foreign Investments in*

to precisely that conclusion some time after 1985, and they advised FTS in 1988 that the Wilner & Scheiner rationale could apply to corporations. See ¶¶111-15, *infra*. But we cannot say that the failure in 1985 to make more explicit disclosures to the Commission regarding alien equity contributions violates the duty of candor.

89. Finally, we reject Metro NAACP's suggestion that Data Transmission Company, 59 F.C.C.2d 909 (1976) ("Datran III"), indicates that the Commission would measure benchmark compliance with respect to capital rather than shares of stock. Datran III concerned *control* of a licensee and not calculation of benchmark compliance, and must be interpreted in that context. Thus, the opinion's reference to a comparison between the alien's equity investment and the nominally controlling party's investment was made only in the context of our analysis of *de facto* control of the licensee; indeed, the opinion notes that the alien's stockholdings were within the benchmark, a determination that appears to be based on a "count the shares" approach. See 59 F.C.C.2d at 910.

90. We thus conclude that at the time FTS filed and amended its Application a reasonable applicant would not have been on notice that alien equity contributions, as opposed to alien shareholding, must be considered in determining compliance with Section 310(b) and that FTS was, in fact, not aware that equity contributions were relevant. Thus, to the extent that FTS did not provide that information in its Application, its absence was not an intentional withholding of information known to be material to the Commission's decision.

4. Other Evidence Inconsistent With Intent to Deceive

91. In addition to the existing legal regime upon which FTS was entitled to rely, the record in this case is inconsistent with a finding that FTS intended to withhold relevant information in the Application. First, we are unable to discern any motive for FTS to conceal the facts of its ownership in 1985. Compare RKO General, Inc., 670 F.2d at 230 (finding of lack of candor reinforced by presence of motive); see WMOZ, Inc., 36 F.C.C. 202, 209 (1964),(motive always an issue in misrepresentation cases). The Metromedia transaction required the Fox companies to commit to $1.6 billion in financing and required Rupert Murdoch to change his citizenship. At the same time, the record shows, because News Corp. could have received FTS's profits either as interest payments or as stock dividends, the company was indifferent to whether its $600 million contribution took the form of debt or equity. Siskind Dep. at 101. Accordingly, as one of the FTS lawyers testified, had FTS believed that it made a difference which way the

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FCC Licensees Under Section 310(b) of the Communications Act, 27 Cal. W. L. Rev. 7, 25 (1990).

money was contributed, the contribution would have been structured so as to conform with the statute. Id. at 24, 31; see also Sarazen Dep. at 50-51.[54] In those circumstances, it seems highly unlikely that FTS would have deliberately created a structure that it knew exceeded the benchmark, and then intentionally concealed that information.

92. Moreover, FTS did in fact disclose that News Corp. would provide $600 million, which was described as the funds needed to close the deal. Setting aside the question of debt versus equity, the Application surely indicates that the funding necessary for the Metromedia transaction was to come from News. Corp.[55] Moreover, the Application explained that News Corp. was entitled to all of the profits from FTS's operations as well as all net assets on dissolution of the company. News Corp.'s financial participation thus plainly gave it benefits typically associated with equity holdings. In light of those disclosures, and given the state of the law at the time, we find that FTS's failure to be more explicit did not reflect an intent to avoid scrutiny of News Corp.'s financial stake in FTS, which, even if not relevant to the statutory benchmark, might have raised questions of *de facto* control of FTS. E.g., Channel 31, Inc., 45 R.R.2d 420 (1979).

93. Furthermore, the record shows that FTS representatives met with both Commission staff and Commissioners concerning the Application both before and after its filing, in which they described the interests of News Corp. and sought the staff's approval.[56] One former Commission employee has stated that FTS attorneys always quickly provided information requested by the staff. Glasser Dec. (Jan. 31, 1995) ¶8. Those actions are inconsistent with an intent to deceive, but consistent with a desire to ensure that the Commission had whatever information it needed to approve a very important transaction.

94. Contemporaneous documents corroborate the testimony. For example, the record contains Arthur Siskind's April 29, 1985 notes (MMB Ex. 25) of a telephone

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[54] We reject Metro NAACP's suggestion that News Corp. could not have raised the money as a debt contribution. The uncontradicted testimony is to the contrary. See Sarazen Dep. at 38, 51-54; DeVoe Dep. at 17; Denvir Dep. at 11, 21; Siskind Dep. at 18, 23-24.

[55] Metro NAACP recognized this point in its Petition to Deny the Philadelphia license, where it argued that, in light of the "Source of Funds" statement, "the acquisition was openly acknowledged to be financed by an alien company and its subsidiaries."

[56] Gardner Dep. at 12-17, 28-30, 33, 61-63, 78-79; Denvir Dep. at 37-38; Levy Dep. at 34; Squadron Dep. at 60-61; Siskind Dep. at 18, 29-30, 49-50, 52.

conversation with another FTS attorney, Joel Levy, which indicate that Levy met with Roy Stewart and other FCC personnel in order to solicit their views on the validity of a trust arrangement. See Siskind Dep. at 94-96. Similarly, a June 7, 1985 "checklist" on the assignment prepared by FTS's attorneys indicates that an FTS attorney was to "follow-up with Roy Stewart explaining the financial structure of the deal." MMB Ex. 45. An intention to "vet" the details of FTS's ownership structure with the Commission's staff, whether or not realized, is inconsistent with an intent to conceal.

95. There is, however, one piece of evidence in the record that appears to contradict our conclusion that FTS did not believe that it exceeded the 25 percent ownership benchmark. FTS attorney Michael Gardner has testified that he believed in 1985 (and at all times thereafter), and that other FTS attorneys understood at the time, that News Corp.'s ownership of THC exceeded the 25 percent benchmark.[57] If that were the case, the duty to provide information would have required FTS expressly to inform the staff that the benchmark would be exceeded. But when we assess Gardner's testimony in context and against the other evidence in the record, including his own contemporaneous written work product, we cannot conclude that his testimony alone raises a substantial issue of fact.

96. First, at his deposition, Gardner explained that his belief in 1985 that FTS's foreign ownership exceeded the benchmark was not based upon an assessment of the amount of News Corp.'s capital contributions or on any knowledge that the Commission would draw a distinction between equity and debt. Rather, Gardner testified that his conclusion that News Corp. would hold more than a 25 percent interest in FTS was based entirely on News Corp.'s entitlement to all profits and losses of the licensee -- which was disclosed in the Application. Gardner Dep. at 10-11, 21-22, 24-26. Indeed, Gardner did not even know the amount of News Corp.'s equity stake, the size of which was decided after the Application had been approved and without Gardner's advice. Id. at 10, 16-17, 30. It thus does not appear that Gardner knew in 1985 that the Commission would draw a distinction between equity and debt or that foreign equity contributions to FTS would exceed 25 percent. As such, he could not have shared that knowledge with his client or his co-counsel, who therefore had no corresponding reason to believe that additional information should be provided to the Commission.[58]

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[57] See Gardner Dep. at 10-11, 21-22, 24-26.

[58] Gardner also testified that he could not recall any discussions in 1985 with FTS attorneys or employees concerning whether News Corp.'s equity interest could be considered "capital stock" relevant to the Section 310(b)(4) benchmark, or that he even used the term "capital stock." Gardner Dep. at 78. Indeed, Gardner testified that he considered benchmark compliance a "non-issue" in light of the Commission's focus on Murdoch's *de facto* control of News Corp.

97. Second, Gardner's testimony that he believed that FTS exceeded the benchmark in 1985 is inconsistent with his written advice to FTS in 1988. Then, Gardner told FTS in an opinion letter that, in light of the Commission's decision in Wilner & Scheiner, "News Corporation's interest in Fox . . . *could be construed* as exceeding the 25 percent benchmark of Section 310(b)(4)." MMB Ex. 1 at 3 (emphasis added). As indicated above, we believe that one could well have perceived that Wilner's rationale might ultimately be extended to corporations and have advised his client accordingly. We find it unlikely, however, that an attorney who believed -- and who had advised his client in 1985 -- that the client's alien ownership in fact exceeded the Section 310(b)(4) benchmark would, three years later, provide the very same client with the plainly qualified advice that its ownership *could be construed* to exceed it.

98. Every other person who participated in the Metromedia acquisition -- including Gardner's own law partner at that time -- testified that they believed FTS to be in compliance with the 25 percent benchmark.[59] All of these persons testified further that none of the participants in the transaction, including Gardner, had suggested at any time that News Corp.'s ownership of the "capital stock" would exceed 25 percent.[60] Likewise, pertinent Commission personnel have stated that they had a consistent understanding. See ¶79, *supra*.

99. In sum, we find that the evidence is overwhelmingly inconsistent with a finding that FTS knew in 1985 that it was exceeding the benchmark. We hold that the totality of the evidence does not raise a substantial question as to FTS's belief in 1985 that its alien ownership did not exceed the 25 percent benchmark. That determination is well within our authority to "determine how much weight to accord disputed facts" in the record before us. Astroline, 857 F.2d at 1561.

E. 1986 Ownership Report

100. We turn next to Metro NAACP's claim that FTS also deceived the Commission in its 1986 Ownership Report. The Report indicated that Murdoch had acquired 5,100 shares of THC preferred stock for $510,000 on December 20, 1985, that

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[59] See footnote 49, *supra*.

[60] E.g., Levy Dep. at 19, 31; Denvir Dep. at 34; Siskind Dep. at 28-30, 33. Even Gardner does not recall any actual discussion of the equity issue with anyone at FTS or News Corp. Gardner Dep. at 77-79.

Barry Diller had acquired 2,500 preferred shares for $250,000 on that same date,[61] and that Fox, Inc., held all 2,400 shares of THC's common stock. MMB Ex. 13 at 15. In the space on the form asking for the total consideration paid for those common shares, FTS referred to an attached Exhibit 3, which stated "[t]he total consideration paid in connection with the transaction is described in the Asset Purchase Agreement filed as part of the above reference[d] Assignment Applications." Id. at 18. That Agreement did not specify the consideration that Fox, Inc. paid for its stock, but gives the total cost of the Metromedia acquisition.

1. The Parties' Contentions

101. Metro NAACP claims that the report is misleading (and therefore constitutes a lack of candor) because it fails to state that News Corp. contributed $425 million to THC's capital despite an express instruction on the form to state the "total consideration paid (if other than cash, describe fully)" for THC's common stock. Instead of specifying $425 million in the appropriate space, FTS referred to an "Exhibit 3." That exhibit in turn did not provide the capital contribution data, but stated that "to the extent the subject holdings were not obtained in connection with [the Metromedia] transaction, this report does not reflect the . . . purchase price paid." In other words, according to Metro NAACP, FTS simply failed to provide the information requested, which constitutes a lack of candor. Metro NAACP sees this omission as part of an overall coverup of THC's equity structure that began with the Application the previous year.

102. In response, FTS argues that the omission does not constitute a lack of candor because, as revealed in the deposition testimony of Thomas Herwitz, the report's preparer, Commission staff had told him that they were not concerned with the amount that had been paid for the THC common stock as opposed to the total amount involved in the acquisition of the Metromedia stations. Indeed, FTS asserts, a literally correct response to the question of how much Fox, Inc. paid for the shares – $24,000 – would itself have been misleading. Moreover, FTS asserts that it filed Ownership Reports not just for itself, but for all of its parent companies up to News Corp., even though the Commission's rules required reports only for FTS and THC, an action, says FTS, inconsistent with an intent to conceal information.

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[61] At the time, Diller was Chairman and Chief Executive Officer of Fox, Inc. Diller Dep. at 4. In 1992 he sold his shares of THC preferred stock to Murdoch for $250,000, their par value. MMB Ex. 7 at 2 n.2; MMB Ex. 13 at 11.

2. Discussion

103. We find that although FTS's Ownership Report did not disclose that News Corp. had contributed $425 million in capital to THC in exchange for its 24 percent ownership interest, the record does not support a finding that the non-disclosure was due to an intentional lack of candor.

104. The record shows that the Ownership Report was prepared by Herwitz, a former FCC employee who was legal assistant to the FCC Chairman shortly before he went to work for FTS. Herwitz testified that he had never before prepared an ownership report and that he accordingly did not know precisely what information the Commission was looking for in response to the "consideration paid" question. Herwitz testified that he was confused on this point because the Metromedia acquisition had been highly complex, involving not only News Corp.'s supplying money to FTS, but also FTS's assumption of the pre-existing billion dollar debt of Metromedia. Herwitz Dep. at 31-32.

105. Herwitz testified, and the evidence gathered from Commission staff corroborates, that he therefore sought guidance on that question (and others) from the staff of the Mass Media Bureau, who indicated that he should provide the total consideration paid in connection with the Metromedia acquisition. Herwitz Dep. at 40-42; Glasser Dec. (Jan. 31, 1995) ¶7. Herwitz did so by referring to the Asset Purchase Agreement with Metromedia, which set forth what Herwitz believed to be the requisite answer. Herwitz's report with respect to Fox, Inc.'s shares of THC is consistent with the report with respect to THC's shares of FTS, for which Herwitz stated in response to the same question that "[t]he total consideration paid in connection with the transaction was in excess of $1.6 billion and is described more fully in the Asset Purchase Agreement filed as part of the above referenced Assignment Applications." This consistency supports Herwitz's testimony on this point.

106. His action is arguably consistent with the instructions on the form, which direct the preparer to specify any non-cash consideration, which Herwitz may have interpreted to mean assumption of debt. Herwitz testified that he specified the consideration paid by Murdoch and Diller because he had been told by the staff that the amounts paid by the attributable shareholders should be specified, whereas for Fox, Inc., the non-attributable shareholder, the Commission was interested only in the total amount of the transaction. Id.

107. Furthermore, the record provides no reason to believe that Herwitz's response had anything to do with alien ownership. As we have discussed above, in 1985 and 1986 a reasonable applicant would not necessarily have known that corporate equity contributions were relevant factors in assessing compliance with Section 310(b).

Moreover, FTS had already informed the Commission in its application that it expected News Corp. to contribute the $600 million necessary to complete the transaction as either debt or equity.[62] Without knowledge that the distinction between the two had any significance for purposes of assessing compliance with Section 310(b), Herwitz would have had no reason to withhold information on equity funding. Although under the circumstances we conclude that Herwitz completed the form in good faith, his response was imprecise, and we believe that the most meaningful response to the question would have been to specifically refer to the $425 million capital contribution that News Corp. ultimately provided to THC.[63]

108. We find that the uncontradicted record evidence shows that Herwitz acted in good faith and that, even if he did not disclose what we in retrospect believe to be important information, he had no intent to withhold material facts.[64] The totality of the circumstances surrounding FTS's 1986 Ownership Report thus does not raise a substantial and material question of fact that warrants a hearing.

F. *Renewal Applications Filed Since 1988*

1. The Parties' Contentions

109. Metro NAACP contends that three internal FTS documents written between 1988 and 1990 demonstrate that by this time FTS knew that its alien equity ownership exceeded the Section 310(b)(4) benchmark, yet failed to disclose its 99 percent alien equity to the Commission in any of the numerous renewal applications filed during that time, all of which certified that FTS was in compliance with Section 310(b). The first document is a 1988 opinion letter written by Gardner that, according to Metro NAACP,

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[62] News Corp. ultimately contributed not $600 million but approximately $425 million.

[63] Herwitz also indicated in the second paragraph of Exhibit 3 that the Ownership Report did not reflect the amount paid for the common stock apart from the transaction, a figure Herwitz said he did not know. See Herwitz Dep. at 39. FTS disclosed in the course of the Bureau investigation that News Corp. paid $24,000 at the time THC issued the common shares. (The additional contribution, totalling approximately $425 million, was treated by THC as additional paid-in capital.) Although that figure would have been a technically accurate response, it arguably would have been less informative than the answer actually provided by FTS and therefore its absence does not support finding an intent to deceive.

[64] We also find inconsistent with an intent to withhold information FTS's submission of ownership reports for all of the companies in the FTS ownership chain up to and including News Corp., none of which were required under our rules.

provided his client with a "clear warning that Fox had not been entirely candid in the past." Rep. Comments at 101. The second document is a 1989 internal company memorandum concerning a potential corporate restructuring of FTS in which Herwitz, an officer of FTS, states that restructuring may be the "straw that broke the camel's back" on compliance with Section 310(b). Metro NAACP urges us to find that this memorandum proves that FTS knew and deliberately withheld information concerning its alien ownership. The third document, a 1990 legal memorandum written on the letterhead of Gardner's law firm, expresses the opinion that "the relative equity interests held by aliens must be considered as capital stock," and urges the recipient to abandon plans for a corporate restructuring because "it is paramount to avoid . . . reexamination of Fox TV's ownership structure by the Commission." Metro NAACP asserts that this memorandum can only be read as part of a "conscious scheme to keep the Commission in the dark" about a fact material to granting the renewal applications. Rep. Comments 105.

110. FTS views the documents very differently. It sees the 1988 opinion letter as an unequivocal endorsement of the legality of FTS's ownership structure, a conclusion unaffected by a tangential discussion about the Commission's use of equity ownership to calculate benchmarks for limited partnerships. The 1989 memorandum, according to FTS, does not express any doubts about the viability of FTS's present ownership structure, but expressed concern should that structure be changed. The 1990 memorandum, says FTS, must be considered in the context of an attempt to discourage a proposed corporate restructuring that was the idea of a single employee who subsequently abandoned it and that might have invited legal challenges from FTS's opponents in the battle over the Commission's financial interest and syndication rules. We will consider each document in turn.

2. The 1988 Opinion Letter

111. The first document is a March 30, 1988, opinion letter from Gardner, FTS's outside communications counsel, to Herwitz, who at that time was FTS's Vice President for Corporate and Legal Affairs. MMB Ex. 1. The letter states that Herwitz had requested an opinion on FTS's compliance with Section 310 in connection with the filing of renewal applications, and states that "[b]ased on the analysis which follows, we believe that Fox is in compliance with the alien ownership provisions contained in Section 310(b)." The letter then sets out that analysis, under the assumption "that the common stock in THC held by Fox, Inc., and ultimately controlled by News Corporation, constitutes in excess of 25 percent of the equity capital of THC." Id. at 2. Because the full analysis is critical to a complete understanding of the letter, we quote it at length:

The focus of a Section 310(b)(4) analysis is on THC as the corporation which controls Fox. The distribution of the voting authority of THC complies with the 25 percent alien ownership limitation of Section 310(b)(4) since stock representing 76 percent of the total vote . . . is owned of record and voted by U.S. citizens.

However, the statute speaks in terms of "capital stock, owned or voted." The Commission has held that, for purposes of Section 310(b), non-voting common stock and limited partnership interests constitute "capital stock." See Reconsideration Order, 1 FCC Rcd at 13-14. In determining whether interests in such "capital stock" exceed the statutory thresholds, the Commission has indicated that it will look to the relative capital contributions represented by such interests. See id. at 14; Declaratory Ruling, 103 F.C.C.2d at 520; Letter from James L. McKinney, Chief, Mass Media Bureau, to American Colonial Broadcasting, dated January 10, 1985. Applying this analysis, since the common stock held by Fox, Inc. represents greater than 25 percent of the equity capital of THC, News Corporation's interest in Fox, held through Fox, Inc., could be construed as exceeding the 25 percent benchmark of Section 310(b)(4).

Even accepting this analysis, we believe that Fox can in good faith certify in its renewal applications that it is in compliance with Section 310(b). The express language of Section 310(b)(4) prohibits ownership interests in excess of the 25 percent threshold only if the Commission makes an explicit finding that such an interest in a corporation controlling a licensee is contrary to the public interest. Thus, an attributable alien interest of greater than 25 percent in a corporation controlling a licensee is not unlawful under Section 310(b)(4) unless the Commission makes an affirmative finding that such ownership is inconsistent with the public interest. The Commission has made no such finding regarding Fox. Indeed, in granting the assignments of the Metromedia stations to Fox, the Commission reviewed and approved Fox's ownership structure. [footnote call] Accordingly, in view of the express language of Section 310(b)(4), the Commission's approval of the assignment of the licenses from Metromedia and Fox's previous disclosures

> to the Commission of its ownership structure, we believe that Fox can in good faith certify that it is in compliance with Section 310(b) in its renewal applications.

The footnote states that:

> The FCC Form 314 application fully disclosed the two classes of voting stock of THC and News Corporation Limited's ultimate control of 100 percent of the common stock representing 24 percent of the vote, although there was no explicit discussion of the relative contributions to capital of the holders of the voting preferred and common stock.

112. This letter demonstrates an awareness by Gardner of the Commission's increasing focus on the relevance of equity capital contributions to the calculation of Section 310(b) benchmarks. Gardner appears to recognize that the Commission may apply an equity contribution test rather than a "count the shares" methodology, even to corporate licensees. We therefore agree with Metro NAACP to the extent it asserts that FTS's counsel had an awareness that corporate equity capital, rather than just shares of stock, could be an object of scrutiny under the alien ownership law.

113. Indeed, between the time FTS filed its 1986 Ownership Report and the time of Gardner's letter, the Commission had issued its Reconsideration Order, to which the 1988 opinion letter cites. There, we declined to issue a blanket exemption for all non-voting limited partnership interests from consideration under Section 310(b)(4), stating that "the adoption of the equity benchmarks in Section 310(b) reflects congressional concern over substantial alien ownership of Commission licensees . . . even where the alien's ownership interest is non-influential in nature." 1 FCC Rcd at 13. We also declined to exempt non-voting preferred stock from our determination of benchmark compliance by corporations, on the ground that such stock is "capital stock" under the plain meaning of Section 310(b). Finally, we declined to reconsider our earlier decision to calculate benchmark compliance of limited partnerships based upon equity contribution rather than partnership share. On the latter point, we expressed our concern that in certain situations, "partnership share could seriously understate the actual equity interest of the aliens." Id. at 14.

114. Like the initial Wilner & Scheiner opinion, the Reconsideration Order might have been seen as part of a trend in our reported decisions toward considering equity generally in connection with Section 310. Indeed, the 1988 opinion letter cited it for that proposition. But, like the initial opinion, the Reconsideration Order does not clearly indicate that for corporations with voting stock only, Section 310 benchmark compliance would be determined based on equity contributions. A reasonable applicant or licensee

in 1988 – particularly one whose capital had been structured to comply with an earlier understanding of the law – would not necessarily have interpreted the Reconsideration Order to apply to corporate voting stock. This is especially true given that in other broadcast contexts, we attribute interests in partnerships and corporations differently. We therefore disagree with Metro NAACP's argument that the Reconsideration Order plainly put licensees on notice that the Commission would consider corporate equity in calculating 310(b) compliance.

115. Our Order in PrimeMedia Broadcasting Inc., 3 FCC Rcd 4293 (1988), released six weeks after the opinion letter, is also relevant to this issue. PrimeMedia addressed the question whether an applicant for a broadcast license was in compliance with Section 310(b) where more than 50 percent of the stock was held by an irrevocable trust whose beneficiary was an alien, but whose trustees, who would vote the stock, were United States citizens. We decided, relying in part on Wilner & Scheiner, that the alien's equitable stake in the applicant by virtue of his position as beneficiary of the trust exceeded the level allowable under Section 310. To be sure, the Order discusses "equitable ownership interests" and concludes that Congress intended to include such interests in the statutory benchmark. But there is no indication in the opinion that we would in the future calculate benchmark ownership levels in corporations in any way other than counting the shares held by foreigners. Thus, a reasonable licensee would not necessarily have interpreted PrimeMedia as having articulated that the Commission would determine benchmark compliance with reference to corporate equity capital contributions.

116. We do not find that the 1988 opinion letter demonstrates, as Metro NAACP contends, that FTS knew that its alien ownership violated Section 310 and hid that knowledge from the Commission by continuing to certify its compliance with the law. Instead, from the client's perspective, the letter broadly affirms the propriety of certifying compliance with Section 310, although it warns that if an analysis that had previously been applied only to non-voting stock and limited partnerships were applied to FTS, News Corp.'s interest "could be construed" to exceed the benchmark. That warning of potential risk is countered, however, by a definitive and strongly expressed statement that FTS could make its certification in good faith. We agree with FTS that it was entitled to rely in good faith on its communications attorney's ultimate conclusion despite the other warning language, and find that FTS was not faced with such facts to suggest that reliance would be inappropriate.

117. We note that the opinion ultimately relies on the theory that alien ownership interests exceeding the 25 percent benchmark of Section 310(b)(4) are permissible unless the Commission finds otherwise and that, because it made so such finding with respect to the Metromedia transaction, the Commission had approved of FTS's alien ownership. Yet, as we discuss above, we reject the presumption that alien ownership greater than 25

percent is acceptable in the absence of an explicit public interest finding to the contrary. More significantly, however, the Metromedia opinion contains no discussion at all suggesting that the Commission considered whether the public interest would be served if News Corp.'s interest in THC were deemed in excess of the 25 percent benchmark. See 102 F.C.C.2d at 1336-1337, 1352. Moreover, the above-quoted footnote to Gardner's letter stated that the 1985 application did not explicitly discuss relative equity contributions. Gardner's theory therefore suggests that the Commission had approved the largest-ever alien broadcast investment without a word to that effect and on the basis of incomplete information.

118. Despite this somewhat remarkable proposition, we conclude that the opinion letter, read as a whole, need not have caused FTS to second guess whether it could "in good faith" certify that it was in compliance with Section 310, especially since FTS's ownership structure had not changed between its creation and Gardner's letter. The record shows that, in fact, the FTS employees responsible for certifying compliance with Section 310 relied on their counsel's ultimate conclusion.[65]

119. Although there are situations where "advice of counsel cannot excuse a clear breach of duty by a licensee," RKO General, 670 F.2d at 231 (citation omitted); United Broadcasting, 94 F.C.C.2d 938 (1983); Asheboro Broadcasting Co., 20 F.C.C.2d 1 (1969), this case is not one of them. First, we do not find that the duty of a corporate licensee to report alien equity capital contributions was sufficiently clear to FTS during this time period to charge FTS with a lack of candor. The foreign ownership question here involved a technical issue in a complex area of the law, making reliance on specialized counsel particularly appropriate. Moreover, there is no indication in the record that FTS did not rely on Gardner's advice in good faith. Herwitz testified that the bottom line of the 1988 opinion letter was that he could certify compliance. Herwitz Dep. at 51. He also testified that he was at the Commission when Wilner & Scheiner was decided, which reinforced his belief that that decision did not apply to corporations. Id. at 53-54, 58-59.[66] As the Review Board noted in Abacus Broadcasting, 8 FCC Rcd at 5113, "the Commission has been . . . reluctant to impute a . . . lack of candor to an applicant where the record shows good faith reliance on counsel." Accord WEBR, Inc. v. FCC, 420 F.2d 158, 168 (D.C. Cir. 1969). This is not a situation like that in WADECO, 628 F.2d at 127, or Pontchartrain Broadcasting Co., 7 FCC Rcd 3264 (Rev. Bd. 1992), recon. denied, 8 FCC Rcd 2256 (1993), where the applicants were aware of

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[65] See Herwitz Dep. at 51-59; Pauker Dep. at 23-24.

[66] See also Herwitz Dep. at 54, 56.

and acquiesced in counsel's plainly misleading submissions to the FCC.[67] In the circumstances presented here, we cannot conclude that there is a substantial issue of fact concerning whether FTS's certifications of compliance following the 1988 opinion letter were the product of deceptive intent.[68]

3. The 1989 "Herwitz Memorandum"

120. The second document that Metro NAACP alleges demonstrates FTS's knowledge that it was violating Section 310 is an October 2, 1989, memorandum from Herwitz to David Handelman, then Vice President and Secretary of THC and General Counsel of Fox, Inc. MMB Ex. 35. See Handelman Dep. at 7, 9. We quote in its entirety the relevant paragraph, which constitutes almost the entire memorandum:

> In order for us to examine the possibility of eliminating Twentieth Holdings Corporation or Fox Television Stations Inc. from the licensee's corporate structure, we need accurate and complete information about all the subsidiaries from the ultimate parent on down. The issue will come down to the stock we place in the Communications Acts' [sic] distinction between voting stock and capital stock. While, presumably, we could increase the protection of a licensee by ensuring that preferred shares are only entitled to 19 percent voting

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[67] In Stereo Broadcasters, Inc., 87 F.C.C.2d 87, 103 (1981), we held that "erroneous advice of counsel, as a matter of policy, is no defense to a violation of the Commission's reporting requirements because of the clear danger to the regulatory process," but there we also found that "the average person could readily appreciate" the incorrectness of the advice and the evidence showed that the licensee himself believed that his actions were illegal. Compare Lorain Community Broadcasting Corp., 18 F.C.C.2d 686, 688 (1969), aff'd sub nom. Allied Broadcasting, Inc. v. FCC, 435 F.2d 68 (D.C. Cir. 1970) (appearing to reject reliance on counsel defense, but finding that licensee's genuine reliance negated intent to deceive).

[68] We are also concerned that we not unduly discourage licensees from turning to attorneys for advice and from relying on that advice in good faith. We encourage licensees to consult experienced counsel and believe that licensees are generally entitled to rely on their advice. We do not think it appropriate to find a lack of candor where a licensee has not second guessed its own attorneys, as long as the advice rendered appears reasonable and is relied on in good faith. We do not wish to create an environment in which licensees are discouraged from seeking and following the advice of legal counsel.

> rights (rather than the present 24 percent voting),[69] that shift may be the "straw that broke the camel's back" if it heightens concerns about the influence of limited-voting capital stock.

Metro NAACP contends that the author's use of phrases such as "straw that broke the camel's back" and "heightens concerns" indicates that Herwitz already had substantial doubts about the legitimacy of FTS's ownership structure, especially in light of the 1988 opinion letter from Gardner suggesting that THC's equity structure could be vulnerable to challenge. Metro NAACP asserts further that the discussion of "capital stock" versus "voting stock" indicates that FTS had realized that there was a distinction between them. Yet, Metro NAACP argues, FTS did not bring those doubts to the attention of the Commission, a failure, it claims, amounts to an intentional lack of candor.

121. FTS interprets the Herwitz memorandum quite differently. It rejects the theory that the memorandum expressed any present doubts about FTS's structure and posits instead that the memorandum concerns only the future effects of a change in the corporate structure that would, by eliminating the holding company, have made THC subject to the 20 percent alien ownership threshold of Section 310(b)(3), which the Commission has no discretion to allow a licensee to exceed. Accordingly, FTS argues, the memorandum does not question FTS's current compliance with Section 310, but only cautions against making changes in the corporate structure. Herwitz did not recall anything about the memorandum or its context. Herwitz Dep. at 63-66.

122. The Herwitz memorandum must be interpreted in light of the opinion letter that Herwitz received the prior year containing counsel's advice that FTS could certify that it was in compliance with Section 310. Although Herwitz himself could not remember anything about the memorandum or its context, the document echoes Gardner's earlier advice when it discusses the difference between capital stock and voting stock and expresses concerns about "the influence of limited-voting capital stock." Thus, while to some degree the memorandum expresses some anxiety about the existing FTS/THC ownership structure, that concern is unremarkable given the 1988 opinion letter's indication that the Commission could consider corporate equity to be "capital stock" within the meaning of Section 310. Yet that uneasiness is precisely the matter that Gardner had addressed the year before when he assured his client that it could certify its compliance with Section 310. We do not believe that FTS's failure to bring to our attention a concern that counsel had raised and laid to rest one year earlier evidences an intent to deceive. We find for the reasons expressed above that at the time FTS was entitled to continue to rely on its counsel's advice. Moreover, nothing in the 1989

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[69] This appears to be an error. It is the common stock, not the preferred stock, that currently has 24 percent voting rights in THC.

memorandum indicates either an intention to withhold information from the Commission or suggests that information had been withheld in the past. We thus conclude that the Herwitz memorandum does not raise a substantial and material question as to whether FTS deliberately withheld information about its compliance with Section 310(b).

123. Furthermore, the memorandum was written in the context of Fox, Inc.'s desire to streamline its corporate structure, principally for tax reasons, Handelman Dep. at 18-19, and is addressed to "the possibility of eliminating" either the holding company (THC) or the licensee (FTS) from the corporate structure. We therefore agree with FTS that the language referring to "heightened concern" about foreign influence primarily expresses reservations about the possibility of concern *if* the ownership structure were to change. There is no prohibition on planning future corporate strategy, such as corporate reorganizations, so as to avoid creating problems that have been identified by counsel. That kind of future planning is what the Herwitz memorandum principally addresses.

4. The 1990 "Brennan Memorandum"

124. The third document is a June 5, 1990, memorandum that appears to be from Gardner and his partner, James Denvir, to Daniel Brennan, then Vice President for taxation of News America Publishing, Inc. ("NAPI"), a domestic subsidiary of News Corp. and the corporate parent of Fox, Inc., THC, and FTS.[70] MMB Ex. 3. A copy was also sent to Larry Kessler, then Vice President and General Counsel of NAPI.[71] Like the Herwitz memorandum, the Brennan memorandum also relates to proposals to restructure the ownership of FTS (although there is no evidence of any connection between the two), and the author expresses some concern about alien equity contributions to FTS. We again quote from the memorandum at length:

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[70] Brennan Dep. at 4. Although the memorandum indicates that it is from Gardner and Denvir, and the handwritten initials "MRG" appear next to Gardner's name, both men testified that they did not write the memorandum and Gardner testified that he did not agree with some of the conclusions drawn in it. See Gardner Dep. at 42-43, 47-53; Denvir Dep. at 22-23, 27. As discussed below, however, Gardner also testified that he was familiar with the issues addressed in the memorandum, and it is on the letterhead of Gardner and Denvir's law firm. Regardless of its actual author, the memorandum was in fact sent and received, at least by Kessler. See Kessler Dep. at 7. Moreover, Brennan remembers discussing the contents of the memorandum with Gardner. Brennan Dep. at 24, 26-27.

[71] Kessler Dep. at 4-5, 7; MMB Ex. 3 at 3.

This memorandum confirms the conclusions reached during discussions last week concerning News America's options for restructuring the ownership of [FTS].

* * *

As we have discussed, Fox TV's current ownership structure is arguably vulnerable to challenge under Section 310 of the Communications Act, which prohibits greater than 25 percent of the "capital stock" of a corporation controlling an FCC licensee to be held by aliens (or a corporation controlled by aliens), if the FCC determines that such ownership would be inconsistent with the public interest.

* * *

As we have previously advised you, clarifications of the alien ownership restrictions adopted by the FCC following [FTS's] acquisition of the Metromedia stations explicitly hold that in evaluating compliance with the Communications Act restrictions on alien ownership, the relative "equity" interests held by aliens must be considered as "capital stock." [citing Wilner & Scheiner and American Colonial].

The Company has previously informed us that Fox, Inc.'s ownership of THC common stock represents in excess of 25 percent of the equity of THC and, therefore (because control of Fox, Inc. is ultimately vested in a foreign corporation) may exceed Section 310's restriction on alien ownership of the "capital stock" of a corporation controlling an FCC licensee. As we have previously advised the Company, since Rupert Murdoch, a U.S. citizen, has ultimate control of Fox, Inc., the FCC could still approve alien ownership in THC in excess of 25 percent since the foreign entities in Fox, Inc.'s corporate ownership chain are ultimately controlled by a U.S. citizen. Because of the uncertainty, however, of the outcome of a challenge to [FTS's] ownership structure, we have been in agreement that it is paramount to avoid any corporate restructuring which would potentially invite reexamination of [FTS's] ownership structure by the Commission . . . .

125. Metro NAACP urges us to draw two principal conclusions from this document. First, it asks us to read the document as a frank realization on the part of FTS and its counsel that the alien ownership benchmarks are calculated by examining equity contributions. Second, it asks us to find that the memorandum's references to "paramount" objectives of avoiding Commission "reexamination" of the FTS corporate structure memorializes a "scheme to keep the Commission in the dark" about the true nature of FTS's alien ownership. Reply Comments at 105.

126. FTS, on the other hand, would have us view the document differently. It contends that the memorandum was addressed to a News Corp. tax attorney who had, of his own initiative, devised a plan to consolidate THC into its parent company in order to achieve tax savings. Thus, according to FTS, the memorandum amounts to a "strongly worded vehicle," intended to discourage the employee from modifying a corporate structure that had been designed specifically to comply with Section 310(b). FTS asserts that any "vulnerab[ility] to challenge" referred to in the memorandum was due entirely to a heated dispute over financial interest and syndication rules that had left Fox with a host of enemies. In that context, FTS claims, the memorandum cannot properly be read to reflect any concern about the existing ownership structure and does not raise any question about failure to disclose material facts to the Commission.

127. We do not agree with FTS that the Brennan memorandum does not reflect concern about FTS's ownership structure under Section 310(b)(4). In contrast to the 1988 opinion letter, the 1990 memorandum does not provide any assurance that FTS was in compliance with the Communications Act, although it indicates that the Commission could still approve alien ownership exceeding 25 percent. Indeed, the memorandum quite plainly indicates that there is such uncertainty concerning the existing ownership structure that FTS should avoid any action that would bring the matter to the Commission's attention. In that important respect, the Brennan memorandum is different from the 1988 opinion letter or the 1989 Herwitz memorandum.

128. We must decide whether the advice and information in the memorandum should have alerted the licensee of its duty to inform the Commission of material information about FTS's ownership structure. Had the memorandum been sent to officers and directors of the licensee, or employees of the licensee responsible for compliance with FCC requirements, those officials should at a minimum have made further inquiry regarding the nature of any legal uncertainties about the ownership structure. The record is clear, however, that the memorandum was sent only to Brennan himself and Kessler, and not to any employee, officer, or director of FTS or THC. Although neither Brennan nor Kessler took any action, we find that because of the nature of their responsibilities their failure to make the views expressed in the memorandum known to others more directly responsible for compliance in communications matters was

not done with any intent to deceive. Thus, the memorandum does not raise a substantial question about FTS's candor.

129. Brennan was an employee in the tax department of NAPI, with no responsibility for or connection to FCC matters. He testified that he viewed the memo's discussion of FCC matters as "arcane stuff and FCC rules," and that he would not have read anything cited pertaining to the Communications Act or FCC cases. Brennan Dep. at 21, 25-26. Indeed, the memorandum made so little impact that it did not stop Brennan from continuing with his consolidation plan. Id. at 28.

130. Kessler was General Counsel of NAPI, and also had no responsibility for or knowledge of FCC affairs. Kessler stated that he took no action after receiving the memorandum "because I was satisfied that there was a theory under which everything was all right." Kessler Dep. at 11-12. He believed that the memorandum was "nothing to worry about or nothing to raise a red flag on because it's a non-problem based on Mickey Gardner's conclusion about Mr. Murdoch's citizenship prevailing if there was ever a question." Id. at 11.

131. In short, only two people saw the Brennan memorandum at the time, both of whom worked for a company three-times removed from FTS up the holding company structure, and neither of whom had anything to do with FCC matters or believed the memorandum raised questions of particular significance. Neither person still works in the News Corp. organization, and both testified that they did not discuss the memorandum with any other person in the company or even with one another. Every other witness, including Herwitz and Pauker, who were responsible for certifying compliance with Section 310, testified that he or she had never seen the document until shown it in the course of the Bureau's investigation.[72] Many of those persons, however, had seen and relied on the 1988 opinion letter.

132. In the circumstances, we do not think that FTS, the licensee, should be charged with any failure to act on the part of Brennan and Kessler. Ideally, Brennan and Kessler would have brought the memorandum to the attention of appropriate personnel at FTS, but both men's lack of familiarity with the concepts of communications law and their lack of responsibility for compliance therewith largely explains their failure to grasp the significance of the memorandum or to inquire further about its conclusions. In sum, we cannot say that the Brennan memorandum demonstrates an intent on the part of FTS itself – the licensee – to withhold relevant information from the Commission. See

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[72] Herwitz Dep at 70; Pauker Dep. at 68-69; Murdoch Dep. at 60; Siskind Dep. at 80; Diller Dep. at 11; Handelman Dep. at 24; Carey Dep. at 39; Sarazen Dep. at 35; DeVoe Dep. at 20.

Tempo Satellite, Inc., 7 FCC Rcd 2728 (1992) (declining to attribute to company behavior of employee who had been involved in serious antitrust violations involving cable television franchising where information concerning the employee's behavior was not known to company officials and managers).

133. We are also satisfied that the Brennan memorandum does not reflect a strategy by FTS to prevent the Commission from discovering facts about its alien ownership. Gardner testified that he believes the memorandum's legal conclusions were "sloppy" and reflected too negative a tone on the question of alien ownership, but noted that, because of Fox's many enemies, he wanted Brennan and his tax plans to "just to go away," and observed that "when you are dealing with outside influences in a big corporation . . . you have to push back very hard." Gardner Dep. at 43-44, 48-49, 52. Thus, the strong wording of the memorandum is reasonably explained by the need to achieve its counsel's immediate goal of not "tinkering" with the ownership structure, id. at 43-44, and is not evidence of a more general intent to hide things from the Commission.

134. The foregoing analysis shows that, taken separately, none of the documents discussed above raises a substantial question of fact concerning whether FTS lacked candor. We further find that, taken together, the evidence does not demonstrate an overall pattern of lack of candor. We reach that determination because the record does not support a finding that there are any links between the events of 1985, those of 1986, and those after 1988. In the absence of such connections, the evidence taken together does not create a picture of FTS's candor that is materially different from the sum of its parts. Thus, having found insufficient evidence that FTS intentionally misrepresented or withheld material facts in any of the individual aspects described above, we also find that FTS has not lacked candor as an overall matter during the last ten years.

G. FTS's Responses to the Bureau's Letters of Inquiry

135. The circumstances surrounding the Mass Media Bureau's Letters of Inquiry and FTS's response are described above at ¶¶19-22. Pertinent here is the first letter's request that FTS "please state the percentage of equity ownership that [News Corp.] or other aliens have [*sic*] in FTS." In response to that request, FTS did not provide the percentage of equity ownership, but answered instead that because voting control, *de facto* control and "capital stock structure" were consistent with the statutory goal of preventing undue alien influence, "the precise dollar value of News Corp.'s equity contribution at any given time would appear immaterial to the Commission's section 310(b) analysis." MMB Ex. 7 at 2.

136. Metro NAACP contends that FTS's failure to state the percentage of alien equity in the face of the Bureau's direct inquiry is itself a lack of candor. FTS asserts in

response that it did not understand the Bureau to be asking for a specific percentage of equity, but that its answer to the first Letter of Inquiry was nonetheless complete because it stated that "substantially all the funding had been provided by News Corp., that News Corp. was entitled to all the profits and losses, and that News Corp. owned the predominant equity interest." FTS Comments at 73-74.

137. We do not find that FTS's March 21 response to the Bureau's inquiry amounts to a lack of candor. In the letter, FTS's attorneys decline to provide the information requested based on a theory under which the percentage of equity contribution was not relevant to the foreign ownership question. As noted, that theory is incorrect, but it is not facially implausible. Thus, we do not find that the letter evidences an intent to withhold information known to be relevant. Moreover, we note that the letter indicates that "News Corp. entities were the source of most of THC's equity funding," MMB Ex. 7 at 2, and that "the amount of News Corp.'s equity funding contribution has always been in excess of 25 percent of THC's aggregate equity funding," id. at 10. Thus, despite the argumentative tone of the letter, to some degree it provided information responsive to the Bureau's question.

138. Nevertheless, we are concerned about FTS's first response to the Bureau's inquiry. FTS did not assert that the information requested was privileged or that it would be unduly burdensome to provide. Neither did FTS argue at the time that the Bureau's request to "state the percentage of equity ownership that [News Corp.] or other aliens have in FTS" was unclear, or seek clarification of the request. Evidence that FTS did in fact understand the question as it was intended is included within its own response: FTS argued that "the Commission's inquiry should necessarily focus, not on the value of contributed capital, but rather on [other factors]." This response reveals that FTS understood the inquiry to address "contributed capital." We also note that the same information was requested in the Second Letter of Inquiry and FTS gave a clear answer: 99+ percent.

139. We recognize that where a licensee has a principled basis for resisting requests for information from the Commission it must be free to assert such arguments. This is not such a case, however. Even if FTS believed the information was immaterial under its own interpretation of Section 310(b), that is not a sufficient basis for failing to answer the question. In the context of this case, where FTS itself had asked the Commission to resolve this issue,[73] and in light of our licensees' duty to respond to Commission inquiries, such a response is not adequate. 47 C.F.R. §73.3514(b) ("The FCC may require an applicant to submit such . . . written statements of fact as *in its judgment* may be necessary.") (emphasis added); 47 C.F.R. §73.1015 ("No applicant

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[73] Letter from William S. Reyner Jr. to William Caton (Feb. 23, 1994).

. . . shall in any response to Commission correspondence or inquiry . . . make any . . . willful material omission bearing on any matter within the jurisdiction of the Commission."); 47 C.F.R. § 1.17 (same); see 47 U.S.C. § 308(b) (Commission may "at any time . . . require from an applicant or licensee further written statements of fact.")

140. We are particularly concerned because FTS asserts that it was responsive. After finally disclosing in its May 23 letter that News Corp. had provided over 99 percent of the equity capital of THC, FTS asserted that "it has always been recognized, even absent a specific percentage, that the common stock of THC represents virtually all of the corporation's aggregate economic/equity interest." MMB Ex. 9 at 3. FTS therefore resisted providing specific information to the Commission that it contends had for all practical purposes already been disclosed. Such conduct is unacceptable. In fact, in this case, the nature of the FTS response in large measure prompted our further investigation.

141. While the Commission expects greater cooperation than FTS exhibited here, we do not find that it raises a substantial question as to the deceptive intent necessary to a finding of lack of candor. FTS failed to make the particular disclosure requested, but did disclose the most salient information for the benchmark analysis at issue -- that News Corp. had contributed over 25 percent of the equity capital to THC. While evasive responses make an applicant more susceptible to a charge of lack of candor and fall short of what we expect from applicants and licensees, in the circumstances of this case we do not find that the issue warrants further investigation as possibly constituting a lack of candor.

H. Murdoch's Stock Ownership

142. The evidence indicates that FTS discovered in late 1986 that, through an "administrative oversight," Murdoch may not have perfected his voting control over a trust that in turn controlled certain News Corp. stock. FTS had earlier told the Commission that Murdoch would have control of the trust, and specifically of the 3 percent of News Corp.'s stock owned by the trust. Metro NAACP claims, based on a March 1987 letter from FTS outside counsel Howard Squadron to Gardner, Document A-52, that the same administrative oversight that may have affected Murdoch's control over the 3 percent of News Corp. stock may also have affected Murdoch's power to control an additional 46 percent of News Corp.'s stock, thus undermining Murdoch's claim that he controlled News Corp. Yet, asserts Metro NAACP, FTS chose not to report that potential problem to the Commission either at a meeting with the Bureau staff in early 1987 or afterwards, which amounts to "a conscious decision . . . not to disclose developments relating to the control of News Corp."

143. FTS responds that Document A-52 shows that at the time FTS's attorneys brought this incident to the Commission's attention, they had focused solely on the effect of the administrative oversight on Murdoch's vote of 3 percent of News Corp. and had not realized that there could be other effects. When FTS counsel brought the oversight to the Commission's attention, they therefore raised only the 3 percent vote matter. FTS appears to argue that even though FTS counsel may not have informed the staff of the other effects of the administrative oversight, FTS could not have had an intent to conceal that information because it had not yet been discovered. FTS also points to MMB Ex. 42, which recounts the meeting between FTS attorneys and the Bureau staff, after which the staff informed Gardner that the oversight was "immaterial."

144. It is not at all clear to us whether the administrative oversight actually affected Murdoch's control of 46 percent of News Corp.'s stock. In any event, we do not find that the evidence raises a substantial and material question concerning FTS's intent to withhold information. The evidence is undisputed that FTS of its own initiative brought this matter to the Commission's attention in January 1987, an act that is inconsistent with an intent at that time to withhold information. With respect to the issue of Murdoch's control of the 46 percent of News Corp., Document A-52 indicates that at the time of their meeting with the staff, FTS's lawyers had not "concentrated" on that issue or even discussed it among themselves. It therefore appears that even though FTS did not bring a potentially serious issue to the staff's attention, FTS had not actually focused on that issue at the time and therefore did not intentionally fail to reveal the matter. Moreover, as Document A-52 indicates, the Commission's reporting rules would not have required disclosure of changes in the precise ownership of News Corp. stock or of trusts that controlled News Corp. stock, since reporting "up the chain" of ownership is unnecessary where, as with THC, there was a single majority shareholder. It thus appears that FTS would not have had a duty to bring to the staff's attention changes in trust ownership. In the circumstances, we do not find a substantial issue of fact warranting a hearing.

I. Other Character-Related Allegations

145. Also before us is Metro NAACP's "Further Supplement to Petition to Deny: Fox' [*sic*] Misconduct in Connection with the Gingrich Book Deal." In addition to supplementing the Petition to Deny, that pleading purports as well to be a petition for review of the Bureau's decision not to expand the scope of its inquiry to include matters concerning a book contract that has been entered into between the Speaker of the House

of Representatives and HarperCollins, another News Corp. subsidiary. That contract received a great deal of media attention at the time it was announced.[74]

146. Metro NAACP's supplement to the Petition to Deny is based on two assertions. First, Metro NAACP claims that the circumstances of the book deal, as reported in the newspapers, raise an "appearance of impropriety" on the part of HarperCollins because the contract was entered into with an influential congressman while the Commission was considering FTS's application for renewal of its license for WNYW-TV. Further Supplement to Petition to Deny at 5. Even assuming that the behavior of HarperCollins would be attributable to FTS,[75] our consideration of "non-FCC" misconduct – *i.e.*, misconduct that may violate the law but does not specifically contravene the Communications Act or a specific Commission rule or policy[76] – is limited to felonies, fraudulent representations, and mass media-related violations of antitrust laws or other laws regulating competition.[77] Character Qualifications, 7 FCC Rcd 6564, 6566 n.31 (1992). HarperCollins's allegedly improper actions would at most constitute such non-FCC conduct. Moreover, non-FCC conduct will not be considered in the absence of "an ultimate adjudication by an appropriate trier of fact." Character

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[74] Although FTS has moved to strike Metro NAACP's pleading on the ground that it must be deemed an application for review of the Bureau's decision not to expand the scope of its investigation and that it fails to satisfy 47 C.F.R. § 1.115(b)(2), we will treat the pleading on the merits as both a supplement to the Petition to Deny and as an application for review. A reasonable reading of Metro NAACP's argument is that the Bureau's refusal to expand its inquiry was arbitrary and capricious in violation of the APA.

[75] We will consider non-FCC misconduct involving related officers and directors where "the licensee principal in question was in control of the other entity or was adjudicated to be involved in the other entity's misconduct." Policy Regarding Character Qualifications in Broadcast Licensing, 7 FCC Rcd 6564, 6567 (1992). We will consider non-FCC misconduct of related companies where (1) "there is a close ongoing relationship" between the two companies at issue; (2) they have common principals; and (3) those principals are "actually involved in the operations of the broadcast subsidiary." Id. Metro NAACP has not alleged facts sufficient to make those determinations.

[76] Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d. 1179, 1183 n.11 (1986).

[77] Although Metro NAACP alleges that HarperCollins's misconduct is related to a Commission proceeding, the asserted misconduct did not take place before the Commission and would not have affected the Mass Media Bureau's inquiry into FTS's candor in any event.

Qualifications, 102 F.C.C.2d at 1205. Metro NAACP has neither alleged nor shown that any of those conditions is met in this case.[78] Metro NAACP has in fact done nothing more than assert an "appearance of impropriety" rather than actual misconduct.

147. Second, Metro NAACP claims that FTS misled the Commission about its intent to seek changes in the alien ownership provisions of the Communications Act. The only relevant representation to the Commission that Metro NAACP identifies is FTS's January 9, 1995, letter in opposition to Metro NAACP's request to enlarge the scope of the inquiry, which states in part that FTS "does not seek a change in [Section 310(b)(4)]." The evidence (again gleaned mainly from newspaper accounts) on which Metro NAACP appears to rely for its assertion that the letter was misleading is the allegedly delayed disclosure that Preston Padden, President for Network Distribution of Fox Broadcasting Company (an FTS affiliate), accompanied Murdoch to a meeting with Speaker Gingrich. Metro NAACP does not explain how Padden's presence at a meeting demonstrates that FTS misled the Commission about its intent to seek changes in the law. The speculation that the presence of a lobbyist necessarily means that FTS was attempting to convince Congress to alter the law is insufficient to raise a substantial and material question of fact.

148. For the foregoing reasons, we also affirm the Bureau's decision not to expand the scope of its inquiry or to refer the matter to the Department of Justice. Metro NAACP has shown no ground for either action. In light of our disposition of the matter, we deem moot FTS's motion to strike Metro NAACP's pleading on procedural grounds.

VII. ALLEGED ALIEN CONTROL

149. Section 310(b)(4) gives the Commission discretion to prohibit the grant of a broadcast license to "any corporation directly or indirectly controlled by any other corporation . . . organized under the laws of a foreign country." Metro NAACP contends that News Corp., a company organized under the laws of Australia, controls FTS. FTS contends that it is in compliance with Section 310(b)(4) because Murdoch exercises *de jure* control of THC and *de facto* control of News Corp. We find that Metro NAACP has set forth a *prima facie* case and therefore we proceed to examine the evidence before us to see if a substantial and material issue is presented on the issue of control of FTS.

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[78] Moreover, Metro NAACP's allegations are based almost entirely on hearsay newspaper reports, which in themselves are of doubtful admissibility. See Metropolitan Council of Metro NAACP Branches v. FCC, 46 F.3d at 1165.

150. As used in the Communications Act, "control" means "every form of control, actual or legal, direct or indirect, negative or affirmative." WWIZ, Inc., 36 F.C.C. 561, 579 (1954), aff'd sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1954), cert. denied, 383 U.S. 967 (1956). We thus examine two types of control: *de jure* (control as a matter of law) and *de facto* (actual control of the licensee). See Metromedia, Inc., 98 F.C.C.2d 300, 306 (1984).

A. De Jure Control

151. *De jure* control typically is determined by whether a shareholder owns more than 50 percent of the voting shares of a corporation. Metromedia, 98 F.C.C.2d at 306. Here, THC has issued 10,000 shares of stock – 7600 preferred shares and 2400 common shares – each with one vote. Murdoch owns all of the preferred shares, and News Corp., through several intermediate companies, controls all of the common shares. Because Murdoch controls 76 percent of the vote in THC, he exercises *de jure* control of the company.

152. Metro NAACP argues that Murdoch does not truly have *de jure* control because the preferred stock is redeemable at News Corp.'s discretion: THC's articles of incorporation provide that two-thirds of the common shares may at any time vote to redeem the preferred shares in exchange for nominal payments. It is well established, however, that future redemption rights are not relevant to determining control until the shares are actually redeemed, which they have not been here. Univision, 7 FCC Rcd at 6674.[79] Therefore, until redemption occurs, Murdoch holds *de jure* control. Moreover, THC's certificate of incorporation expressly forbids the redemption of the preferred shares if it would result in foreign ownership levels that violate Section 310(b). We have held that such restrictions on redemption or conversion effectively assure compliance with the Communications Act.[80] See Data Transmission Co., 44 F.C.C.2d 935, 935 (1974); Data Transmission Co., 52 F.C.C.2d 439, 439-40 (1975).

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[79] Accord Attribution of Ownership Interests, 97 F.C.C.2d 997, 1021-22 (1984), reconsidered in part, 58 R.R.2d 604 (1985), further reconsidered, 1 FCC Rcd 802 (1986); Coral Television Corp., 29 F.C.C.2d 266, 278 (Rev. Bd. 1971).

[80] Metro NAACP argues that letters from News Corp.'s independent auditor, Arthur Andersen & Co., to the SEC demonstrate that the redemption feature of the preferred stock proves that News Corp., not Murdoch, controls THC. See Doc. J-11, at 4; Doc. J-15, at 2; Doc. J-16, at 2; Doc. J-22, at 5-6. To the contrary, the Arthur Andersen letters do nothing more than describe the redemption feature and have nothing to do with control of THC.

153. Metro NAACP also contends that the preferred stock should be considered debt rather than equity, and thus that it does not convey *de jure* control. The preferred stock is really debt, the argument goes, because its only return is a small fixed dividend, like an interest payment, and the shares have no claim on the profits of the company or its assets upon liquidation. We find that argument unconvincing. The THC preferred stock includes a feature that definitively differentiates it from debt: the right to a majority vote on corporate affairs. That very distinction has led us not even to consider debt as an ownership interest under our attribution rules. See Transfers of Control of Certain Licensed Non-stock Entities, 4 FCC Rcd 3403, 3409 n.7 (1989); Attribution of Ownership Interests, 97 F.C.C.2d at 1022.[81] It therefore does not matter for purposes of our *de jure* control analysis that the preferred stock has certain other properties that may resemble debt. Cf. Reconsideration Order, 1 FCC Rcd at 13-14 (non-voting preferred shares are "capital stock" for purposes of Section 310(b)). Neither does the stock's redeemability transform Murdoch from a controlling stockholder into a creditor. See In re Culbertson's, 54 F.2d 753, 757 (9th Cir. 1932).

B. De Facto Control

154. Determining *de facto* control is more complex than counting the votes; unlike *de jure* control, it "'transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented.' Case-by-case rulings are therefore required, and we have considered a variety of factors in making our determinations." Univision, 7 FCC Rcd at 6675 (quoting Stereo Broadcasters, Inc., 55 F.C.C.2d 819, 821 (1975)); see Storer Communications, Inc., 101 F.C.C.2d 434, 441 (1985) ("corporate control varies from case to case and cannot be precisely defined"). The determinative question is whether the allegedly controlling party has the power to "dominate the management of corporate affairs." Univision, 7 FCC Rcd at 6675 (quoting Benjamin L. Dubb, 16 F.C.C. 274, 289 (1951)). Here, the totality of the evidence demonstrates that Murdoch holds *de facto* control of THC.

155. In addition to Murdoch's control of 76 percent of THC's vote -- which itself strongly indicates *de facto* control -- Murdoch is the chairman of THC and one of its directors as well as Chairman and CEO of Fox, Inc., THC's direct parent company. In those capacities, he exercises "direct oversight over the management and day-to-day operation of the Fox-owned television stations," and he "actively participate[s] in all significant decisions relating to the finances, programming, and personnel of the stations." Murdoch Dec. (Mar. 21, 1994) ¶2. The current President of FTS, Chase Carey, who also serves as one of the three directors of THC, has testified that "Rupert

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[81] We note, however, that the level of debt may be considered as a factor in determining the lender's *de facto* control.

Murdoch controls and runs" both of those companies. Carey testified that he reports directly to Murdoch and no one else on all material corporate matters. Carey Dep. at 36-37. See also Murdoch Dep. at 6 ("I'm the man who gives all the instructions" at FTS).

156. We assess that evidence in light of the ultimate meaning of *de facto* control: the ability to dominate the management of corporate affairs. With three quarters of the vote, the chairmanship, and active day-to-day management of the most important activities of the company, Murdoch dominates THC/FTS's affairs. Murdoch's authority amounts to "the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue." WHDH, Inc., 17 F.C.C.2d 856, 863 (1969), aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). In this respect, Murdoch's authority at FTS is similar to that of the controlling shareholder in WLOX Broadcasting, Co. v. FCC, 260 F.2d 712, 715 (D.C. Cir. 1958), where the court found that the person who set financial policies and dictated the management of the operations of the licensee exercised *de facto* control even though he held only a small minority of the vote.[82] See Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713, 716 (1981) (party that made basic policy decisions at station in control, not party that supplied all facilities); Stereo Broadcasters, 87 F.C.C.2d 87-99 (1981) (*de facto* control held by person with apparently small investment in station, but running day-to-day operations). In contrast, in WWIZ, Inc., 36 F.C.C. at 561, the majority shareholder was found to lack control where he had little input into day-to-day management and the evidence showed that another man made all of the important decisions. Id.

157. Metro NAACP nevertheless insists that several factors on which we have relied in past cases to find *de facto* control of a licensee demonstrate that News Corp. is in control. Specifically, Metro NAACP points to News Corp.'s financial contribution to THC, the two companies' common directors and legal counsel, and FTS's use of another News Corp. subsidiary to provide its programming.

158. There is no dispute that News Corp. holds a large financial stake in THC – it contributed $425 million, amounting to 99 percent of THC's equity – and in past cases we have determined that a large financial contribution was an important consideration in our finding *de facto* control by an investor that lacked voting control. E.g. WLOX, 260 F.2d at 715; Capital City Community Interests, Inc., 2 FCC Rcd 1984, 1987 (Rev. Bd. 1987); Pacific Television, Ltd., 2 FCC Rcd 1101, 1101-03 (Rev. Bd. 1987). But we do not typically find that a large financial investment by itself conveys control. Instead, we

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[82] Although that person had also contributed much of the licensee's money, financial contribution was only one factor in the court's decision.

have said that it is only an *indication* of control. As we stated in Univision, "the ultimate question is not the source of funds. It is instead the control of the licensee's finances." 7 FCC Rcd 6676-77. Accord Seven Hills Television Co., 2 FCC Rcd 6867, 6880 (Rev. Bd. 1987) ("financial investment is not the *sine qua non* of legal control, [but] just one of several . . . indicia").[83] Cf. Telemundo, 802 F.2d at 516 ("The usual indicia of control or influence over a corporations affairs . . . may not always reflect operational reality").

159. When we weigh News Corp.'s financial interest against the evidence of Murdoch's *de facto* control, we do not find that there is a substantial question whether News Corp. actually controls FTS. First, the evidence shows that News Corp.'s investment has been specifically restricted to prevent it from exercising control. The funds provided to THC and FTS to acquire the Metromedia stations and for initial operating costs were structured "so that no operational control or authority over the television broadcast licensee will be permitted by non-U.S. citizens or entities at any time or upon default of any intracompany loan." MMB Ex. 14 at 38. That restriction significantly reduces the possibility that News Corp. could control FTS.

160. Indeed, News Corp.'s investment appears to have been passive. Although FTS has held its licenses for nearly a decade under the present ownership structure, there is no evidence before us that News Corp. has ever exercised or even sought to exercise control of FTS. Metro NAACP does not allege any specific incident of actual control by News Corp. See Seven Hills, 2 FCC Rcd at 6878 (no evidence of actual control probative of lack of control). We have held that a showing of *de facto* control must rely on facts and events that have occurred and not on speculation as to what might occur in the future. William S. Paley, 1 FCC Rcd 1025, 1025-26 (1986), aff'd mem. 851 F.2d 1500 (table) (D.C. Cir. 1988). More particularly, in the absence of any "extrinsic evidence that a financier's leverage has manifested itself in the actual operations of a licensee, we can [not] find improper *de facto* control." Seven Hills, 2 FCC Rcd at

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[83] These cases appear to reflect a retreat from the stricter approach taken in Channel 31, *supra*, where we ordered a hearing over control of a station for which an alien investor had furnished the large majority of the necessary funds. On the other hand, in Channel 31 there were indications that the nominal licensee was a "straw man" of the foreign company, which had the option to take control of the station at any time. 45 R.R.2d at 421-422. Those factors are not present here.

6880.[84] We accordingly have no reason to believe that News Corp.'s financial contribution to THC and FTS has overridden Murdoch's actual control.

161. The effect of News Corp.'s investment in THC is mitigated even further by strong evidence that Murdoch wields substantial influence over News Corp. as well. Although we believe that it is not necessary to reach the disputed issue of Murdoch's *de facto* control of News Corp.,[85] Murdoch's authority at News Corp. substantially bolsters his personal control of FTS. The record shows that Murdoch is chairman and CEO of News Corp., in which capacities he "personally directs all significant aspects of News Corp.'s activities." Siskind Dec. at ¶10. Murdoch designates the other directors of the company and has traditionally been designated to vote the vast majority of proxies at the annual shareholders meetings. Through a complex series of trusts, Murdoch also appears to control a substantial portion of News Corp. shares.[86]

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[84] We reject Metro NAACP's assertion that THC and FTS's guarantee of debt issued by News Corp. demonstrates that News Corp. controls THC and FTS. This circumstance is entirely consistent with close intercorporate relationships and does not show News Corp. controls those companies, particularly in light of the evidence that Murdoch controls them.

Metro NAACP claims that a letter from News Corp.'s auditor, Arthur Andersen, to the SEC characterizes THC as a "controlled subsidiary" of News Corp. due to the debt guarantees. As explained more fully below, the letter concerns financial reporting, not the Communications Act, and its conclusions are based only on the notion that "appropriate evaluation of [News Corp.'s] financial position suggests that failure to consolidate THC would be misleading to investors." Doc J-11, at 4. The letter thus has little probative value for our purposes.

[85] We find that it is not necessary to reach that issue because we have determined that News Corp.'s financial contribution to THC does not raise an issue of alien control even in the absence of a finding that Murdoch holds *de facto* control of the parent company. Moreover, the facts surrounding Murdoch's control of those trusts are hotly disputed.

[86] In the Application, FTS asserted that Murdoch would exercise *de facto* control over 49 percent of News Corp.'s voting shares. See MMB Ex. 14 at 15-16. Murdoch was ultimately unsuccessful in perfecting his voting control over one of the trusts that directly held 46 percent of News Corp.'s shares. See Doc. A-52. Nevertheless, it appears that Murdoch has at least a considerable amount of influence over more than 30 percent of News Corp.'s shares by virtue of his corresponding influence over the trusts that own them.

162. In sum, we do not find that News Corp.'s financial stake in THC raises a substantial issue of fact concerning control of FTS. We recognize that News Corp.'s financial interest is large, and perhaps unprecedented in our decisions. The unique circumstances presented here, however, well justify our conclusion.

163. The foregoing analysis also leads us to reject Metro NAACP's argument that because all of THC's directors also hold positions with News Corp., THC is controlled by News Corp. Certainly there are circumstances under which such commonality of personnel would indicate control by the corporate parent. E.g., Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475, 2479 (1993), recon. denied, 9 FCC Rcd 2567 (1994). As with financial contribution, however, common directors can *indicate* control, but we have never found it to be dispositive by itself. Here, weighing the substantial evidence of Murdoch's actual control of the licensee against the influence of the common directors, no substantial question of fact results. The evidence shows that "Murdoch personally designates all directors, all members of board committees and all senior executives of News Corp. and its principal operating subsidiaries," which presumably includes THC. Siskind Dec. ¶9. Thus, it is likely that any overlap between the board of News Corp. and that of THC actually demonstrates Murdoch's substantial influence at News Corp. and his *de facto* control over THC and FTS and not News Corp.'s.

164. We likewise dispose of Metro NAACP's claim that the use of the same counsel by both News Corp. and FTS demonstrates News Corp.'s control of FTS. Once again, although in certain circumstances common counsel can be evidence of control, it is by no means a dispositive factor, and the evidence of record greatly outweighs it in this case. As with the companies' common directors, their use of common counsel more likely demonstrates Murdoch's *de facto* control of THC and FTS and his substantial influence at News Corp.[87]

165. Metro NAACP asserts in passing that News Corp. controls FTS because another News Corp. subsidiary provides FTS with most of its programming. Not only

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[87] Metro NAACP's reliance on Poughkeepsie Broadcasting Co., Ltd., 5 FCC Rcd 3374, 3377-78 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 2497 (1991); and Carta Corp., 5 FCC Rcd 3696, 3697 (Rev. Bd. 1990), modified in other respects, 6 FCC Rcd 6498 (1991), is misplaced. Both cases involved sham partnerships in which counsel was foisted upon an allegedly controlling general partner by allegedly passive limited partners as a means for the limited partners to exercise actual control. That situation bears no resemblance whatsoever to this case, in which there is no evidence that the passive investor has exercised actual control or has dictated the choice of counsel, and there is substantial evidence that the nominally controlling person is actually in control.

has Metro NAACP failed to offer any proof of its assertion, but it has also ignored that fact that the programmer, Fox Broadcasting Company, is, like FTS itself, a subsidiary of THC, which controls FTS and over which Murdoch holds *de jure* control. Moreover, like the other factors discussed above, affiliated source programming does not necessarily indicate control. See Seven Hills, 2 FCC Rcd at 6881-82. The totality of the evidence does not give rise to a substantial question of fact on control.

C. Representations to Other Agencies

166. Metro NAACP has identified various representations made by News Corp. to the Securities and Exchange Commission ("SEC") that it claims lead to two conclusions: first, that News Corp. holds *de facto* control of FTS; and second, that inconsistencies between the disclosures to the SEC and FTS's representations to the FCC prove that FTS intentionally lacked candor about its ownership and control because "News Corp. and Fox assert that Mr. Murdoch's ownership of the preferred stock of THC should be a significant factor to the FCC . . . [but] in their dealings with the SEC they have repeatedly argued that this same stock ownership has no significance." FTS argues in response that Metro NAACP has taken isolated statements out of context from complex reports, and that read properly, the statements do not have the meaning ascribed to them by Metro NAACP and are not inconsistent with representations made to this Commission.[88]

167. The SEC materials on which Metro NAACP relies must indeed be interpreted in their proper context: submissions to an agency that is responsible for protecting investors by ensuring the accuracy of financial reports and whose statutes are intended to effectuate that goal. The SEC's mission materially differs from our own task of ascertaining operational control of broadcast facilities. As such, the SEC may define "control" differently from the way we do, and we accordingly are not "bound [by] . . . definitions of 'control' used in securities law." Storer Communications, Inc., 101 F.C.C.2d at 442. We find that, analyzed in this context, representations made to the SEC by News Corp. do not raise a substantial and material question as to FTS's control or its candor toward the Commission.

168. The document on which Metro NAACP most heavily relies is a February 1993 letter from News Corp.'s auditor, Arthur Andersen & Co., to the SEC, Doc. J-11,

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[88] Since we are satisfied that there are no genuine inconsistencies between News Corp.'s statements to the SEC and FTS's representations to this Commission, we need conduct no further investigation. Compare IDB Communications Group, Inc., 10 FCC Rcd 1110, 1114 (Int'l Bur. 1994)(ordering an investigation of the differences between representations to the Commission and the SEC).

making the following statements: (1) that the interest represented by THC's preferred stock is "immaterial" to THC's total equity; (2) that "redemption of the preferred stock . . . is outside the control of the preferred shareholder;" (3) that THC's guaranties of News Corp. debt "view and treat THC like any other wholly owned subsidiary" of News Corp. and make its financial position "inter-dependent with" News Corp.; (4) that the companies' joint directors "necessarily manage THC for the benefit of" News Corp.; and (5) that the "true controlling financial interest in THC rests with" News Corp.

169. We do not find that Document J-11 raises a substantial factual question that News Corp. controls THC within the meaning of the Communications Act. The letter's stated purpose is to establish that consolidation of THC and News Corp.'s financial reports is necessary, "notwithstanding the lack of technical majority ownership, . . . to present fairly the financial position and results of operations" of News Corp. In other words, in order for News Corp.'s investors to have an accurate picture of the company's performance, it must treat THC – for reporting purposes – as being like "any other wholly owned subsidiary." The notion of control pertinent to the SEC thus clearly concerns financial relationships, which appear to be unlike the operational relationships pertinent to *de facto* control under Section 310(b). The Arthur Andersen letter is not addressed to operational control at all.[89]

170. We also find, as indicated above, that FTS did not lack candor with respect to THC's financial relationship with News Corp. FTS revealed in its initial applications that News Corp. would be entitled to all of the profits and losses of THC and to all of its residual value upon dissolution. It is therefore no surprise that an accountant believes that the two companies' accounts must be consolidated, that the "true" financial interest in THC is held by News Corp., or that THC is managed for the "benefit" of its parent company. Those conclusions follow naturally from the facts and do not demonstrate that News Corp. was telling the SEC facts that were materially different from its revelations to this Commission. The redemption feature of the preferred shares was also disclosed in 1985, and we have discussed above its impact on News Corp.'s control of THC.[90]

171. To be sure, as of February 1993, FTS had not expressly told the Commission that the capital represented by the preferred stock of THC was immaterial to its total equity, as it informed the SEC in Document J-11. But as we have discussed above, FTS did not believe itself to be under an obligation to produce that information at that time, thus negating an intent to withhold that information. We thus do not find that the Arthur Andersen letter raises a substantial question of candor.

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[89] This reasoning disposes of similar arguments made with respect to Documents I-6, J-9, J-10, J-14, J-20,and J-22.

[90] This reasoning disposes of similar arguments raised with respect to Document J-10.

172. Metro NAACP also directs our attention to News Corp.'s 1993 Annual Report to the SEC, Doc. I-7, which explained the basis for consolidating THC with News Corp. for financial reporting purposes as follows:

> The consolidated financial statements include all the entities which The News Corporation Limited controls. For financial reporting purposes, control generally means ownership of a majority voting interest in an entity, but may, in certain instances, result from other considerations, including a company's capacity to dominate decision making in relation to the financial and operating policies of the consolidated entity. Although The News Corporation Limited has less than a majority voting interest in [THC], such entity is included in the consolidated financial statements because The News Corporation Limited is deemed to control such entity for financial reporting purposes.

Doc. I-7 at F-10. Metro NAACP asserts that by this statement, News Corp. is telling the SEC that it dominates the operating policies of THC; *i.e.*, that it controls THC as we have interpreted that term under the Communications Act.

173. The context of the consolidation statement is, like the Arthur Andersen letter discussed above, an explanation of why News Corp. must consolidate THC's finances in order to give a fair picture of its own. As above, "control" must be interpreted accordingly. Moreover, we do not think that the consolidation statement should be read as an acknowledgment that News Corp. dominates the operations of THC; rather, it more likely reflects that News Corp. has the dominant financial interest in THC's operations for SEC reporting purposes. A careful reading of the statement thus shows that, from an accountant's perspective, non-voting control may result from several "considerations," including, but not on the face of the statement limited to, a capacity to dominate decision making. But the remainder of the statement does not apply the domination standard to THC; rather, it leaves open the possibility that some other, unspecified, factor -- such as News Corp.'s 99 percent equity contribution and its entitlement to all of THC's profits -- leads to "control" as that term is used in financial reports. That interpretation is consistent with the approach that Arthur Andersen took when it asked the SEC for permission to consolidate the companies for the purposes of this very report.[91] In any event, as discussed above, we are fully satisfied that Murdoch

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[91] This reasoning disposes of Metro NAACP's assertions that several other documents, J-18, I-2, and I-7, prove that News Corp. "operates" the FTS television stations. In each case, the a document contains a passing reference, to FTS's being one of News

has *de jure* and *de facto* control of THC and that operational control does not reside in News Corp.

D. Representative of Aliens

174. Lastly, we reject Metro NAACP's suggestion that Murdoch must be considered to be the representative of aliens, in violation of Section 310(b)(4)'s prohibition on the "representative" of an alien's owning or voting more than 25 percent of a licensee's capital stock. Murdoch, the argument goes, is a representative of aliens by virtue of his fiduciary duties to News Corp., as its chairman and a director, and to the various foreign trusts and investment companies that hold News Corp. stock for the benefit of himself and his family, of which he is trustee. FTS relies in response on Murdoch's control of News Corp. and on his sworn declaration that he votes his shares of THC in his personal capacity.

175. We believe that "representative" as used in Section 310(b) means a person who is under the control of an alien, a finding that is not supported by the record. See Seven Hills, 2 FCC Rcd at 6886 (licensee found to be representative of aliens where his own testimony showed he was an agent of foreign interests). Murdoch's uncontradicted declaration states that he votes his THC stock in his own, individual behalf, and not under the direction of News Corp. or any other entity. Murdoch Dec. (Dec. 1, 1993) ¶6. Moreover, any duties that Murdoch owes to News Corp. by virtue of his official corporate roles, or to trusts by virtue of being a trustee, are not sufficient to make him a "representative" of those entities. Fiduciary duties do not make the fiduciary an all-purpose agent of the person or company to which the duty is owed. In any event, in light of the evidence of Murdoch's substantial influence over News Corp., it is not at all clear that Murdoch's corporate roles could possibly make him News Corp.'s representative for the purposes of Section 310. We find that the record does not present a substantial question of fact on this point.

Corp.'s "principal business[es]" or similar language. Each document refers to securities matters and not to FCC matters.

We are likewise unpersuaded by Metro NAACP's reliance on statements made by Barry Diller at the time he resigned as Chief Executive Officer of Fox, Inc. MMB Ex. 39. Diller stated that his "desire to become an actual principal in the business activities with which I was associated" was not possible because "Fox is a wholly owned unit of News Corp." Id. at 1. It appears that Diller was referring to Fox, Inc., as that same paragraph refers to his position as CEO of Fox, Inc. In any event, Diller's concept of "ownership" does not determine our conclusion concerning control. See Diller Dep. at 16 (indicating that his statement in the press release was "not a legal distinction").

VIII. BENCHMARK COMPLIANCE OR PUBLIC INTEREST WAIVER

176. In this decision, the Commission has comprehensively explained the statutory basis for its conclusion that corporate capital contributions are relevant to determining compliance with Section 310(b)(4)'s ownership benchmark. Applying this conclusion to the facts of this case, we have held that News Corp.'s 99 percent capital contribution to THC exceeds the 25 percent benchmark. As explained in ¶53, a licensee is permitted to exceed the benchmark where the Commission affirmatively finds that the "public interest" would be served as a result.

177. FTS has argued in the course of this proceeding that, in the event the Commission determines that its ownership structure exceeds the benchmark, the Commission should nevertheless approve its renewal application under the public interest standard of Section 310(b)(4). MMB Ex. 9 at 5-8. Among other public interest considerations, FTS maintains the following: it has established a fourth broadcast network; reduced the dominance of the three existing networks, thereby improving the position of local stations relative to the networks and providing competitive choices for advertisers, program suppliers and viewers; promoted the viability of UHF television stations; facilitated local news programming; and made available increased children's programming. Comments of FTS at 76-90. FTS also suggests that the public interest implications of its ownership structure should be analyzed in light of Murdoch's *de jure* and *de facto* control of THC and by FTS's assertion that Murdoch has *de facto* control of News Corp. Metro NAACP, on the other hand, has disputed certain of these statements and whether they justify a public interest finding. Reply Comments of Metro NAACP at 111-119.

178. These factors, including the arguments concerning them raised by FTS and Metro NAACP, will be considered as part of our public interest determination. As explained more fully below, we believe that information regarding the costs or other impacts of achieving benchmark compliance will also be a factor to be considered in the particular circumstances of this case and that the parties should have the opportunity to comment on this issue in light of our decision here. We therefore decline to make a public interest determination at this time and shall allow further submissions on this issue. Accordingly, not later than 45 days from the release of this order FTS may elect to proffer a renewed public interest showing in support of its existing ownership structure (or some other structure that exceeds the benchmark) or, in the alternative, may file a statement that it will elect to comply with the benchmark.

179. If FTS decides to make a renewed public interest showing, it may address any factors it believes relevant to that determination. However, because this case involves examination of the Section 310(b)(4) public interest question ten years after the applicant's initial authorization, we particularly invite comment on certain matters that

are not addressed in the record. In particular, we specifically invite FTS to submit information regarding the costs or other impacts of achieving benchmark compliance and the extent to which achieving compliance would adversely affect the public interest.[92] If FTS elects to comply with the benchmark, its submission must indicate how and when it intends to achieve compliance.

180. Other persons may comment on FTS' submission 30 days thereafter. FTS may reply to said comments in not more than 15 days. The Commission intends to rule promptly thereafter.

IX. ORDERING CLAUSES

181. Accordingly, IT IS ORDERED, that the Petition to Deny, filed April 12, 1994, by The Metropolitan Council of NAACP Branches, IS DENIED.

182. IT IS FURTHER ORDERED, that the Further Supplement to the Petition to Deny: Fox' Misconduct in connection with the Gingrich Book Deal, filed January 27, 1995, by Metro NAACP, IS DENIED, and that the Motion to Strike filed on February 6, 1995, by Fox Television Stations, Inc., IS DISMISSED AS MOOT.

183. IT IS FURTHER ORDERED, that FTS SHALL, not later than 45 days from the release date of this Order, SHALL SUBMIT a showing as to why its existing ownership structure, or some other structure that exceeds the statutory benchmark, is in the public interest or, in the alternative, NOTIFY the Commission whether, how, and when it intends to bring its ownership structure into compliance with the statutory benchmark. Other persons may comment on FTS's notification or public interest submission 30 days after FTS's filing, and FTS may reply to any such comments no later than 15 days thereafter.

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[92] We also note that the Commission recently issued a Notice of Proposed Rulemaking, which proposed that the public interest standard for Section 310 (b)(4) be modified to include consideration of whether the primary markets of the foreign entity seeking to exceed the benchmark offer effective access to United States citizens and companies seeking to participate at a similar level as is being requested by the foreigner in the United States. See Market Entry & Regulation of Foreign-Affiliated Entities, FCC 95-53 (Feb. 17, 1995).

184. IT IS FURTHER ORDERED, that the application of Fox Television Stations, Inc. for renewal of license (File No. BRCT-940201KZ) IS GRANTED, subject to the outcome of the further Commission proceedings concerning any public interest submission or notification by FTS as described in the preceding paragraph.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

CONCURRING STATEMENT
OF
COMMISSIONER JAMES H. QUELLO

RE: FOX TELEVISION STATIONS, INC.
RENEWAL OF LICENSE OF STATION WNYW-TV

With the millions of words of information, vituperation, and speculation that have already been expended on this matter, one may well wonder why at this juncture I find it necessary to carry more verbal coals to this particular Newcastle. The answer is easy: in this welter of words, perhaps the only perspective on these events that has not been presented is mine, the only Commissioner still sitting who participated in the unanimous 1985 Commission vote on the Fox applications.

The time has come to give you my perspective. I can support this item, except for the decision to call for yet more comment prior to determining whether to waive Section 310(b)(4)'s foreign ownership limitations on behalf of Fox. In my view, the record as it stands today amply supports a decision to waive the statute's 25 percent benchmark without the need for further comment.

I have not spoken in detail of what went into my decision to approve the assignment of the Metromedia licenses to Fox in 1985 for several reasons. Chief among them, of course, was the allegation that, at the time of the Commission vote or at some point thereafter, Fox could have either intentionally misled or failed to be forthcoming with the Commission on the question of its ownership structure. If true, these allegations would have naturally required a reexamination of the public interest determination that I had previously made. I have therefore deliberately withheld final judgment pending the results of the staff's investigation into these matters.

That investigation has been exhaustive, and its results are now in. I have reviewed it carefully. It confirms the basis for my determination in 1985 that granting the applications would serve the public interest. Perhaps just as important, however, in my view the record also validates the key factors that would enable this Commission to make a similar public interest judgment today. The first key factor is that Fox is controlled both in law and in fact by an American citizen. The other key factor that was decisionally significant to me was that in approving the applications the Commission would finally be creating the long-sought but hitherto-unattained fourth broadcast network.

I fully agree with the finding that Fox was not guilty of either misrepresentation or lack of candor in presenting its proposed ownership structure to the Commission ten years ago. Although I cannot speak for other members of the Commission or for the staff, I for one was never in any doubt about what Fox intended for one very simple reason:

I asked. I asked, and Fox gave me what I considered then, and consider now, to be a perfectly frank response: that Rupert Murdoch, an American citizen, would control 76 percent of the voting stock of Fox. For that reason, it was, and still is, immaterial to me whether all, or part, of the equity ownership of the company resided with Fox's parent, News Corp. The item before us today finds that what I found to be true in 1985 continues to be true in 1995: Mr. Murdoch is, and has at all times been, in both de facto and de jure control of Fox.

Similarly, the creation of the fourth broadcast network was, and is, an overarching public policy goal that has been served by the creation of Fox. There is extensive factual evidence in the record about how clearly and compellingly News Corp.'s economic participation in the Fox structure over the last ten years has served the Commission's fundamental policy objectives of economic competition and viewpoint diversity. First, and most fundamentally, the Commission's approval of the applications in 1985 provided the physical infrastructure and economic foundation for the creation of the fourth national broadcast television network.[1] The Commission fully expected the Fox acquisition to lead to the development of this network.[2] And sure enough, the creation of the Fox station group and the emergence of the Fox Network has advanced the Commission's objective of providing competition to the established national broadcast networks and their affiliates.[3] The Fox Network has provided economic, programming, and marketing support to enable many independent UHF stations to achieve stability and profitability.[4] The presence of Fox has also enhanced the value and bargaining power of local affiliates of all networks in many markets.[5] Fox has increased the amount of locally-produced news programming on its owned stations[6] and made possible the expansion or creation of local news programming by Fox affiliates.[7] In the last four years, the number of Fox affiliates presenting local prime-time newscasts has increased from 15 to 50.[8] Anchored by the Fox-owned stations, the Fox Network also presents 19 hours per week of children's programming, including three hours per week of informational and

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[1] *Fox Comments, February 27, 1995 (hereinafter, "Fox Comments")at 76-79.*

[2] *See, e.g., Denvir Tr. at 41 (Chairman Fowler sought creation of a fourth network to compete with the three established networks).*

[3] *Fox Comments at 79-80.*

[4] *Id. at 80-83.*

[5] *Id. at 88.*

[6] *Id. at 84.*

[7] *Id.*

[8] *Id. at 84-85 and Appendix D.*

educational programs.[9]

It is also significant to note that Fox has increased the amount of programming addressing the interests of African Americans and other minorities.[10] In the process, Fox has provided a national platform for minority producers, writers, actors and other members of the creative community.[11] Indeed, even while the local Metropolitan Council of the NAACP was attacking Fox before the Commission, the Fox Network was being honored by the national NAACP with 22 Image Award nominations for its programming! In fact, Fox held a **majority** of the nominations in three of the Image Award categories.[12] Last - but certainly far from least - the Commission itself has previously acknowledged the public interest benefits that have resulted from Fox's activities.[13]

Notwithstanding how strongly the factors of American control and the creation of the fourth network counted in favor of approving the Fox acquisition, however, one might question whether, in voting to grant the applications in 1985, I unwittingly gave short shrift to the possibility that News Corp.'s capital contributions to Fox might substantially exceed the 25 percent benchmark. Here again, the item confirms my analysis at that time. The item before us shows that in 1985 the Commission had not clearly ruled that we would count a parent corporation's capital contributions in determining a subsidiary corporation's compliance with the 25 percent benchmark, making an explicit waiver necessary if they exceeded that amount. Indeed, the item demonstrates that the Commission's precedent on counting equity ownership since 1985 is perhaps most politely characterized as a moving target.

So in my judgment, in 1985 Fox did not need anything explicitly waived. To the extent its possible ownership structure was disclosed and before us for approval - which it was - I made an informed decision to approve it. In doing that I fully considered the issue of who was going to exercise control of the company, and I believed then, as I do now,

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[9] *Id. at 87.*

[10] *Id. at 89.*

[11] *Id.*

[12] *Fox Response to Supplement to Petition to Deny, December 2, 1993 at 11-12.*

[13] *See Fox Broadcasting Co., 5 FCCRcd 3211, 3213-14 (1990) (emergence of the Fox Network advanced the Commission's "longstanding" and "oft-stated" public interest goals of "fostering a competitive UHF service," "encouraging new national networks," and promoting "more, and more diverse, children's programming"); Evaluation of the Financial Interest and Syndication Rules, 8 FCC Rcd 3282, 3333 (1993) (Fox "has greatly enhanced" both source and outlet diversity).*

that the creation of the fourth network was a compelling public interest goal. From this perspective, it matters little either in law or in logic that the words "waiver" and "benchmark" were not explicitly used in 1985 in reference to the possible equity ownership structure. I knew what the decisionally significant issues were. They were the same issues that would have been decisionally significant had they been couched in terms of a waiver. I made my decision based on them.

Which brings me squarely to today. I understand that the vagaries of our evolving precedent and the need to tidy up our regulatory desks might warrant this Commission's desire to use the correct legal incantations to waive the benchmark. I am perfectly willing to do this. More to the point, I am perfectly willing to do this today.

Throughout the ten-year period in which Fox has been a licensee, there has never been, and there is not now, even the slightest implication of any foreign influence, much less "undue" foreign influence, over the management and operations of Fox. Given that the prevention of such undue foreign influence is the very reason the alien ownership provision was enacted, to do anything short of granting Fox any waiver that might now be necessary strikes me as a solution in search of a problem. In my view the record unequivocally shows that Fox is operating in the public interest notwithstanding its not being in compliance with a statutory interpretation that post-dates the Commission's 1985 decision by ten years. From this perspective, it seems pointless to spend much effort wondering what it might cost Fox to bring itself into compliance. For if Fox is operating in the public interest under its current ownership structure, it stands to reason that any costs Fox would incur to change this structure would not be required in the public interest. Under those circumstances, for us to impose such costs would be, by definition, unnecessary, arbitrary and capricious.

I can imagine some possible arguments that might be made in favor of requiring Fox to achieve a greater degree of compliance with the 25 percent benchmark. It could, for example, be argued that we have never before waived the 25 percent benchmark in a broadcast case, and to do it here - where virtually all the equity ownership is in the hands of News Corp. - would simply be too big a step to take.

I have not found any Commission precedent to support the notion that the Commission can only grant waivers incrementally. The reason for this is simple: if a licensee happens not to be complying with one of our rules and the public interest is nevertheless being well-served, why enforce that rule against that licensee at all? This is particularly persuasive in this case, where the statutory interpretation in question was made a decade after the applicant began operating and where it can be documented that the applicant has been operating in the public interest. Why mess with success?

Then there could be the related argument that, if we grant a waiver of this magnitude now, how can we possibly deny any waiver request in the future? And I suppose my answer here is, bring me another waiver request that exhibits the same unique

circumstances as this one, including an American-controlled licensee operating the fourth network for ten years under apparent statutory authority, and I undoubtedly would feel constrained to grant the same relief. Suffice it to say, however, that I for one am not lying awake at night worrying that such an unlikely waiver applicant is apt to land on our regulatory doorstep. And in the meantime, I would propose that we proceed with any future waiver requests that do not feature the unique circumstances pertaining to this case exactly as we always have and always will - on a case-by-case basis. Granting the waiver in this case will affect that approach, and the outcomes of those future cases, not one iota - unless, as I say, some future waiver applicant manages to wind up in precisely the same set of circumstances that Fox is in today - a highly unlikely, if not impossible, scenario.

The above analysis would also apply to what might be characterized as the "Aha, but suppose something changes?" argument. The gist here would be that, even if the current Fox ownership structure is serving the public interest, what happens if Mr. Murdoch chooses to retire? Then what? The simple answer is that, when and if something material changes, the Commission will have the opportunity to approve any change, or disapprove any change, or even change any change, in the normal course of our customary assignment and transfer processes. There is no need at this juncture to fix what isn't broken.

So my bottom-line analysis of the waiver issue goes something like this. On the one hand, we have Fox. Fox obtained all the authorizations needed at the time to establish its broadcast network in 1985. We find Fox to be in the complete control of an American citizen. Although its parent corporation is a foreign entity and owns virtually all its corporate equity capital, Fox has never at this or at any other time been found to be under any influence whatsoever from its parent. Moreover, under its current corporate structure Fox has injected new competitive vitality into the television broadcast marketplace, and in doing so has been found by this Commission to be meeting the public policy goals we had in authorizing its station acquisitions.

On the other hand, we have a law. As of today, the Commission is interpreting this law to bar foreign corporations from holding more than 25 percent of the capital stock in domestic corporate broadcast licensees. The purpose of this law is to assure that such foreign entities do not exert undue control over the programming and other operational activities of broadcast licensees or otherwise prevent them from operating in the public interest. This law did not clearly apply to Fox's equity ownership structure until ten years after we approved the acquisitions with which Fox launched a fourth American broadcast network. Finally, this law has always been waivable upon a persuasive showing that, under the facts of an individual case, exceeding the 25 percent benchmark would serve the public interest.

In deciding this waiver issue I must confess that I am not a lawyer, so my approach to communications problems is perhaps somewhat different, although I do have expert legal

advisors. So I tend to ask where, in any given matter, do reason and justice predominate? Which viewpoint scores the most points morally, ethically, practically, and legally?

I find guidance in a quote from a great President, Franklin Delano Roosevelt. Back in 1940 President Roosevelt expressed his view of the role that administrative agencies should play in government. He said, "A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decision with an eye that looks forward to results rather than backwards to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

In this case I believe the legal record, reason and justice all warrant our waiving the 25 percent benchmark on behalf of Fox today. It is only because I continue to believe that this result will ultimately be reached, and reached quickly, that I will not dissent to the part of the item that defers decision on this issue to another day. Nevertheless, I must emphasize my view that it is past time to conclude this proceeding and refocus our attention on matters in which the merits are not as clear-cut as they are here. It is time to free Fox from costly litigation and unsubstantiated accusations and grant it the freedom and assurance to again devote all its resources to providing the public a strong, competitive, diverse, American fourth network.